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Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context

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LEGAL WRITING (GROUPS) AT THE UNIVERSITY OF MONTANA: PROFESSIONAL VOICE LESSONS IN A COMMUNAL CONTEXT

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The writer at her work
is odd, is peculiar, is particular,
certainly, but not, I think,
singular.
She tends to the plural.[1]

INTRODUCTION

The University of Montana School of Law has received national attention[2] over the past few years for its efforts to design an academic program that derives its content from the "world of lawyering in all its dimensions."[3] We are committed to designing

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* Professor, University of Montana School of Law. The Legal Writing Program at the University of Montana is the handiwork of a multitude of collaborators. I have tried to name as many of those collaborators as possible throughout this article; without their unfailing generosity and talents we would not have had the fortune to experience the virtues of collaboration that we preach.

This article, too, is the result of many people's efforts. Tom Huff, Scott Burnham, Peggy Sanner, Carl Tobias, Brenda Desmond, and Dean J. Martin Burke were kind enough to read and respond to early drafts. I am most especially grateful to Carolyn Wheeler to whom collaboration appears to come naturally and who shares her extraordinary gifts with gentleness and humor.

1. U. Le Guin, *The Writer on, and at, Her Work*, in THE WRITER ON HER WORK, VOLUME II: NEW ESSAYS IN NEW TERRITORY 216-17 (J. Sternburg ed. 1991).

2. *See, e.g.*, The American Bar Association's National Conference on Professional Skills and Legal Education, Albuquerque, New Mexico (Oct. 15-18, 1987), *reprinted in* 19 N.M.L. REV. 1, 95-96, 109 (1989); Bahls, *Teach Students How to Practice Law: The University of Montana's Radical Goal for its Professors*, 17 STUDENT LAW., Feb. 1989, at 31; DeBenedictis, *Learning by Doing: The Clinical Skills Movement Comes of Age*, A.B.A. J., Sept. 1990, at 58-59; Mathewson, *Verbatim*, 16 STUDENT LAW., Dec. 1987, at 12 (legal writing program); Schneider, *Integration of Professional Skills into the Law School Curriculum: Where We've Been and Where We're Going*, 19 N.M.L. REV. 111, 111 n.1 (1989); Letter from R. MacCrate to S. Bahls (Sept. 18, 1990) ("I have received several communications which single out the Montana School of Law for having accomplished a . . . competency-based approach to legal education and how you have attempted at Montana to prepare your students for the practice of law into which they will go.").

3. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 35 J. LEGAL EDUC. 189, 191 (1986) [hereinafter Mudd, *Beyond Rationalism*].

The distinctive feature of our academic program is the "four dimensional" model of lawyering our faculty uses as a touchstone in curriculum design. Dean John O. Mudd and the faculty identified that four dimensional model during the early stages of our academic planning project. *See* Mudd, *Beyond Rationalism*, *supra*, at 202-05; Mudd & LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 29 n.26 (1988). The first dimension is "knowledge," characterized as "[t]he general knowledge as well as the

an academic program that derives its content from the world of lawyering because we are committed to preparing our students to enter that very world.[4] Our resolve to "train novice lawyers,"[5] evidenced since 1911,[6] may explain our historic regard for legal writing. Since it opened, the Law School has included legal writing in its required curriculum; since 1971, we have required our students to complete four legal writing courses.

Although it too derives its content from the world of lawyering, the Legal Writing Program draws its instructional strategies and learning activities from learning and composition theories. Currently, learning and composition theorists agree that: (1) students are the principal actors in their own learning and in the learning of other students; and (2) writing groups belong in a professional writing program because they are faithful to the principal role that students play, as writers and as readers, in learning to find "their professional and personal voices."[7]

All legal writing programs that require students to write comply with certain principles of learning and composition theories. Decidedly, students who write participate actively in their learning (and thinking) processes. Many legal writing programs, however, suffer from the methodological flaws afflicting the rest of the law school curriculum; more unfortunately, the students in those programs miss the chance to profit from the findings of composition theory. Composition theory today disturbs settled notions of "author," "text," "reader," "authority," and the relationships among them. Absent any familiarity with the conversations about composition, about "rhetorical invention," professional writing teachers and their students merely meet the conventions of "legal writing"

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technical legal knowledge necessary to permit the graduate to diagnose legal problems, to obtain necessary additional information, and to offer appropriate courses of action." *Id.* The second dimension is "skill," defined as "[t]he cognitive skills required to analyze legal issues and the professional skills needed to transform existing situations into those that are preferred." *Id.* The third dimension is "perspective," "[t]he ability to evaluate the role played by the lawyer in different situations and to view legal problems within their larger contexts." *Id.* The final dimension is "character," "[t]he personal attributes and interpersonal skills required for the graduate to represent clients effectively." *Id.* Most recently, Dean Mudd has elaborated on the perspective dimension. Mudd, *The Place of Perspective in Law and Legal Education*, 26 GONZ. L. REV. 277 (1990/91).

4. "[A]n academic program that links professional education to professional action may be called 'performance-referenced.' " Mudd, *Beyond Rationalism*, *supra* note 3, at 197. For more on the history of our decision to convert to a performance-referenced program, see Mudd & LaTrielle, *supra* note 3, at 12.

5. Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 876 (1985).

6. *See* "Background," *infra* Part I.

7. Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1102 (1986) [hereinafter Phelps, *Legal Rhetoric*].

rather than become literate as lawyers.

Our experiences at the University of Montana School of Law convince me that attention to these conversations would "re-form" legal writing programs. Admittedly, the challenge to improve legal writing programs[8] and the writing and reasoning skills of law students and lawyers[9] defies easy solution. Not many dispute, however, that law schools have failed to respond imaginatively to this challenge. Roberta Ramo, a lawyer active in the American Bar Association (ABA) who speaks throughout the country about how better to prepare law students to enter the practice, trumpets the need for legal educators to find ways to cultivate the writing skills of lawyers-in-training:

> [Writing skills] are virtually non-existent in the ways in which we need them. I am astounded as I go to meetings of managing partners of law firms from all over the country to discover everyone singing the same song: No one knows how to write! I am not telling you that you are not training people to write first class law school exams. I am telling you that I have yet to find the legal problem that resolves itself in a blue book answer. Lawyers must write clearly and persuasively to be understood by both clients and judges.[10]

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8. The following citations are a sampling of recent articles that discuss legal writing in law schools: ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) (the Cramton Report); Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23 (1985); Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292 (1980); Carrick & Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, XXX N.Y.L. SCH. L. REV. 645 (1985); Cox & Ray, *Getting Dorothy Out of Kansas: The Importance of an Advanced Component to Legal Writing Programs*, 40 J. LEGAL EDUC. 351 (1990); Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298 (1980); Gordon, *An Integrated First-Year Legal Writing Program*, 39 J. LEGAL EDUC. 609 (1989); Kissam, *Seminar Papers*, 40 J. LEGAL EDUC. 339 (1990); Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987) [hereinafter Kissam, *Thinking*]; Phelps, *Legal Rhetoric, supra* note 7; Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149 (1984); Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 NOVA L.J. 867 (1986).

9. Some of the many recent books and articles that address, and usually criticize, lawyers' writing are: C. GOOD, MIGHTIER THAN THE SWORD: POWERFUL WRITING IN THE LEGAL PROFESSION (1989); R. GOLDFARB & J. RAYMOND, CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING (1982); T. GOLDSTEIN & J. LIEBERMAN, THE LAWYER'S GUIDE TO WRITING WELL (1989); Gopen, *The State of Legal Writing:* Res Ipsa Loquitur, 86 MICH. L. REV. 333 (1987) (article includes a comprehensive bibliography of writings about legal writing); Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986); Leskovac, *Legal Writing and Plain English: Does Voice Matter?*, 38 SYRACUSE L. REV. 1193 (1987); Miner, *Confronting the Communication Crisis in the Legal Profession*, XXXIV N.Y.L. SCH. L. REV. 1 (1989); Phelps, *Writing Strategies for Practicing Attorneys*, 23 GONZ. L. REV. 155 (1987/88) [hereinafter Phelps, *Strategies*]; Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

10. Roberta Ramo, Remarks at The American Bar Association's National Conference on Professional Skills and Legal Education, Albuquerque, New Mexico (Oct. 15-18, 1987),

Ramo understates the challenge facing legal education and legal writing teachers specifically. As professional and prolific writers, lawyers must do better than to write clearly and persuasively. They must be able to identify the audience and purpose of any text they compose and they must be able to "speak to" that audience and meet that audience's needs. As lawyers, writers must be able to write efficiently as well as effectively. Composition theory offers teachers and students of writing the theories, strategies, and practices that empower us to begin to identify and satisfy the demands we face as professional writers. Writing groups, small groups of writers working cooperatively to respond to one another's writing, are the optimal practice for learning to identify and satisfy the demands we face as professional writers.

This article probes the constitution[11] and condition of the Legal Writing Program at the University of Montana School of Law. Part I briefly describes the background of our current writing program. Part II reviews traditional and contemporary explanations of learning to make a case for embracing various forms of active and collaborative learning, especially learning groups, in legal education. Part III surveys changing conceptions of writing—from product to process, from instrumental skill to critical process, from solitary act to social activity—and highlights the changes in our Legal Writing Program, including the adoption of writing groups, corresponding to those multiple perspectives on the writing process.

In the end, I hope to convince readers that small groups working cooperatively train novice lawyers much more effectively than the methodologies customary to traditional legal education. Even more, I hope to inspire readers to audition writing groups in both educational[12] and professional contexts.

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reprinted in 19 N.M.L. REV. 12 (1989). Ramo speaks as a practicing attorney who has personally observed the writing skills of novice attorneys. She speaks with and for other practicing attorneys with similar personal observations. From her experience, Ramo concludes that law school examination writing (blue book answers) and "legal writing" are incompatible. Phillip Kissam, a law professor who has written often about how law schools could better foster writing skills suited to law practice, agrees with Ramo. Indeed, he has written a comprehensive article, what he calls a " 'systemic analysis' and a 'total critique' " of law school examinations, carefully accounting for the incompatibility Ramo denounces. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 435, 437 (1989).

11. Four core courses constitute the current Legal Writing Program. See the Appendix for a description of each of the four courses. Although only four courses wear the explicit label, "Legal Writing," several other courses integrate writing exercises, *e.g.*, Contracts I and II, Legislation (in which all students amend a federal statute in response to a judicial opinion), Pretrial Advocacy II (in which all students draft a summary judgment brief), and Estate Planning (in which all students draft a will and probate an estate). Our academic program also includes seminars in which students draft research papers.

12. I thank Professor Beverly Chin, University of Montana Department of English, for

I write this article for the members of the State Bar of Montana who might want to know more about one of the programs at the Law School that they generously support.[13] I write this article for my colleagues throughout the country who teach legal writing and reflect endlessly on the experience. Mainly, I write this article for my students—past, current, and future—who sometimes wonder about the method to our legal writing madness.

I. BACKGROUND

A. The Beginning

Recognizing its responsibility to the state to train novice lawyers, this law school, since 1911,[14] has been committed not only to educating students to think like lawyers, but to training students to work like lawyers as well.[15] In the 1912-13 *Register*, the school announced its educational goals and methodology:

> The law school graduate, even from the best law schools, is very apt to be much disappointed to find, on his admission to the bar, that he is almost entirely unfitted and unprepared to take up the ordinary practical work of his profession. He is ordinarily not even trained to use a law library or look up a point of law for himself, let alone taking up the trial of a lawsuit. All this is left to a post-graduate apprenticeship in a law office, in order that the professors may have time to elaborate their legal theories on all possible subjects.
>
> The Faculty of Montana Law School, while appreciating the necessity of theoretical knowledge of fundamental principles of substantive law, yet believe that it is the duty of the law school to do more than is ordinarily attempted to train the student for his every-day work and teach him how to handle himself well in

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giving me the confidence to introduce collaborative learning in legal writing courses.

13. To all of the people in Montana who have contributed to our legal writing program year in and year out for the last decade, I offer my heartfelt gratitude. Joan Jonkel and Nancy Moe are two of the most tireless and loyal contributors.

I wish to thank publicly the following people who served for one year or ten years or somewhere in between as "external assessors" in Legal Writing I over the past decade: Jon Binney, Terry Burnham, Connie Campbell, Carolyn Emmons, Karl Englund, Kris Foot, Patrick Frank, Leslie Halligan, Larry Jones, Ralph Kirscher, Diana Liebinger, Helena Maclay, Robert Marcott, Paul Meismer, Joan Newman, Bill Rossbach, Sue Roy, Molly Shepherd, Mike Sherwood, Christopher Swartley, Teresa Thompson, Tom Trigg, Jack Tuholske, and John Whiston. Other people, such as George Corn, Randy Cox, and Bill Wagner, made themselves readily available for miscellaneous service.

14. For one first-hand account of the early days at the University of Montana School of Law, see Sloan, *Completing My Education*, 52 MONT. L. REV. 419 (1991).

15. At its inception, the University of Montana School of Law went beyond the "rationalist approach to professional education." *See* Mudd, *Beyond Rationalism*, *supra* note 3, at 194-96.

court, manage the various phases of litigation, organize and conduct corporations, examine and pass on titles and execute the ordinary operations of actual practice.

The Montana Law School attempts to perform its duty in these respects by giving great attention to the "practice court," and also to the practical side in all the courses.[16]

By giving marked attention to the practical side in all the courses, the law faculty not only instructed in subject matter but also introduced students to lawyering skills required to handle routine legal transactions within the subject area. Although most substantive courses included practical instruction, three independent courses contained a sizeable component devoted to legal writing: "Practice Court,"[17] "Pleading and Trial Practice,"[18] and "Appel-

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16. UNIVERSITY OF MONTANA, THE EIGHTEENTH REGISTER OF THE UNIVERSITY OF MONTANA, MISSOULA, MONTANA 105-06 (1912-13) [hereinafter REGISTER]. The *Register* statement continued:

> In the Montana Law School the practice court is put on the basis of a regular course, required during the first, second and third years. It is presided over by the regular professors, all of whom assist in the work, and by practicing lawyers who are invited from time to time to sit as presiding judges.
>
> The first year court is largely occupied with authority work, briefing, and the oral argument of questions of law, and the trial of criminal cases.
>
> The second and third year courts devote themselves to the trial of issues of fact. In order to make the work realistic, many of the cases are founded on the enacting of a burglary or other transactions in which the witnesses and parties are University students. Thus the questions raised at the trial relate to what was really said and done, with the sufficient local color to arouse interest and enthusiasm.
>
> The student is required to prepare the evidence, collate the facts, interview witnesses and get up a careful trial brief. The course includes the entire conduct of actual cases from start to final judgment and also the appeal and presentation to the supreme court for review. This involves the issuance of summons, the drafting and filing of pleadings, the making of motions, the impaneling of the jury, the examination and cross-examination of witnesses, the arguments to court and jury, and all the other incidents of a contested trial.
>
> Sessions of the court are held weekly for two hours in the afternoon or evening, and between sessions the cases are being prepared and carried from stage to stage by the student-attorneys in charge under the supervision of the instructor, who gives personal guidance in the work.

Id. at 106-07.

17. *Id.* at 108-09.

> [T]he practice court is put on the basis of a regular course, required during the first, second and third years. It is presided over by the regular professors, all of whom assist in the work, and by practicing lawyers who are invited from time to time to sit as presiding judges.
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> . . . .
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> . . . [The] [f]irst year course . . . [includes] library practice in the use of law books, and the search for authorities; brief-making and the oral argument of questions of law; trial of criminal cases.

Id. at 106, 109.

18. *Id.* at 108, 110.

late Practice."[19]

I draw the reader's attention to the early curriculum to show this school's concern with "the practical side," long before such concern was fashionable. In the same tradition, in 1971 this law school required students to complete four separate legal writing courses.[20]

> Nothing is more difficult or embarrassing to the graduates of most law schools than to draw pleadings and prepare for the trial of a case. Unusual attention is given by an experienced practioner [sic] to teaching both the science and the art of successful pleading, and the function it plays in the actual case itself, both at the trial and on appeal. By exercises and actual practice in the drawing of pleadings of all kinds the student acquires a practical knowledge of how to plead logically, accurately and scientifically. Upon all points Montana cases are frequently cited and references made to the most interesting and instructive modern cases in other jurisdictions.

Id. at 109.

19. *Id.* at 108, 110.

> The appellate jurisdiction of the various courts is considered, what judgments, orders and proceedings may be appealed from, parties who may appeal, time within which appeal may be taken, and then the various steps by which the appeal is taken. Actual practice will be given in preparing the record proper and the bills of exceptions.

Id. at 111.

20. Although unsophisticated by present standards, the program adopted in 1971 was comprehensive. In Legal Writing I, the law librarian instructed the first-year class in legal research and, without instruction, required the first-year students to draft one memorandum of law. In Legal Writing II, several members of the full-time faculty supervised the first-year students' performance of the routine elements of appellate advocacy, drafting an appellate brief and participating in an oral argument. In Legal Writing III, the corporations professor required second-year students to prepare the documents necessary to incorporate a business, *e.g.*, articles of incorporation, bylaws, and a shareholders' agreement. In Legal Writing IV, several members of the full-time faculty supervised the second-year students' second appellate advocacy experience, which entailed preparing a memorandum of law and an appellate brief, and presenting an oral argument on constitutional issues.

About 1978, although the number of required courses remained the same, the school altered their staffing and content. A tenure-track faculty member took over Legal Writing I, instructing students on the fundamentals of memorandum drafting and requiring students to draft six memoranda during that first semester. Local attorneys cooperated in teaching the course, designing the memoranda problems, reading the students' memoranda, and meeting individually with students to review their memoranda. The faculty member also hired five third-year members of the law review to design legal bibliography exercises and to help instruct the first-year students in legal research. In Legal Writing II, the property professor required students to draft a contract for deed with an accompanying letter to a hypothetical client or memorandum to the hypothetical lawyer who assigned the task, explaining the specific provisions of the contract.

Between 1981 and 1986, Legal Writing III lived the life of a chameleon. One year, it was freestanding, and the students drafted briefs supporting or opposing a motion to dismiss for lack of federal subject matter jurisdiction. For two years, it accompanied the then second-year, required Estates course, and the students drafted a will and probated an estate. Another year, it accompanied Constitutional Law, and the students wrote a research paper analyzing the opinions of a particular United States Supreme Court Justice of their choosing. Finally, Legal Writing III found a permanent home, accompanying Business Organizations.

B. Transition

The current Legal Writing Program owes its ambitious goals and unusual features to the comprehensive academic program review, called the Academic Planning Project,[21] initiated by Dean John Mudd in 1979.[22] He asked the law faculty to study and respond to the question: What should the academic program of the University of Montana School of Law be in ten years? Committed to preparing our students to enter the world of lawyering, the faculty was correspondingly committed to constructing an academic program linked to professional action. To that end, the faculty, with the help of a consultant, designed and administered a survey of all members of the state bar to gather information on the abilities needed by a new lawyer in Montana.[23] The results of the survey helped the law faculty to identify "the abilities needed to practice law in the setting in which most of the school's graduates are employed,"[24] and thus determine the content of the curricu-

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From 1971 through 1990, Legal Writing IV remained essentially the same.

21. We named the process of converting our academic program into a performance-referenced program the Academic Planning Project. We began that process in 1979. A more complete description of the process of academic program review and the results achieved through 1983 is found in UNIVERSITY OF MONTANA SCHOOL OF LAW, ACADEMIC PLANNING PROJECT: INTERIM REPORT (1984) [hereinafter INTERIM REPORT]. For a more recent report, see Munro, *Integrating Theory and Practice in a Competency-Based Curriculum: Academic Planning at the University of Montana*, 52 MONT. L. REV. 345 (1991).

22. John O. Mudd was dean of the University of Montana School of Law from 1979 to 1988. He not only initiated the Academic Planning Project and continued to support curriculum review and planning throughout his tenure as dean, but he also wrote about the nature of legal education and the process of curricular reform. *See, e.g., supra* note 3.

23. The first formal stage of the Academic Planning Project involved a survey of members of the Montana Bar, asking them to make two judgments regarding 149 items of legal knowledge, professional skill, and personal qualities related to law practice. For each item, the lawyers rated the level of competence needed to practice law effectively and the level actually observed in lawyers who were in their first year of law practice. Predictably, practicing attorneys strongly emphasized the importance of professional skills required to handle routine legal transactions and the apparent lack of mastery of those professional skills by beginning attorneys. They also concluded that new graduates were deficient in their knowledge of certain substantive areas of law. Mudd & LaTrielle, *supra* note 3, at 26. For a more complete description of the process and results of the lawyers' survey, see Mudd & LaTrielle, *supra* note 3.

24. *Id.* at 12. Many faculty members are committed to preparing our students to enter the practice of law in Montana because about ninety percent of our graduates remain in Montana to practice law. Distinctive features of Montana practice make special demands on the curriculum of a law school that chooses to prepare its students to enter practice in that state. Reflecting Montana's small (approximately 800,000 residents) and widely scattered population, law firms in Montana are small (only twenty firms have more than ten lawyers). Most lawyers are general practitioners. Perhaps because of the predominance of small firms, few of our graduates enjoy the luxury of "apprenticeship" as associates upon entering practice. The law school has responded to the general nature of Montana practice with a highly compulsory, and performance-oriented, academic program. Students must earn ninety cred-

lum. The faculty turned to the practice and practitioners of law for counsel on the content of the curriculum. Similarly, we consulted the theories and theorists of learning processes for advice and direction on methodology questions—how to enable students to develop and refine those abilities.

In our initial review of both traditional legal education and our own academic program, we detected weaknesses in content,[25] methodology,[26] and assessment practices.[27] First, most academic programs concentrate almost exclusively on the doctrinal and analytical dimension of lawyering.[28] Second, large classes characteristic of legal education "lead to a passive and impersonal educational experience; whereas law practice is both active and personal."[29] Third, rarely does a law school "delineate clearly and precisely . . . the educational objectives toward which its evaluation process is directed,"[30] and rarely do individual law professors publicly and explicitly articulate specific course objectives to students,[31] nor do they announce the criteria by which they assess student performance.[32] Last, law professors provide students with minimal

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its to graduate; they earn seventy-two in required courses. First-year required courses include Civil Procedure, Contracts, Drafting, Legislation, Legal Writing, Pretrial Advocacy, Property, and Torts. Second-year required courses include Business Organizations, Constitutional Law, Criminal Law, Criminal Procedure, Evidence, Federal Taxation, Legal Writing, and Trial Practice. Third-year required courses include Appellate Advocacy, Commercial Transactions, Estate Planning, and Advanced Lawyering. Several of these required courses are "skills courses," designed to enable students to perform competently as lawyers without extensive on-the-job training. We also require that third-year students complete four semester credits of "clinical," choosing among several offerings, including the Indian Law Clinic, the Montana Defender Project, Montana Legal Services Association, the Natural Resources Clinic, Missoula County Attorney's Office, and University of Montana Legal Counsel's Office.

25. For a review of the "content" criticism of traditional legal education, see, *e.g.*, Mudd, *Beyond Rationalism*, supra note 3, at 189-91, 192-93, 194-95.

26. For a criticism of the "methodologies" of traditional legal education and a provocative account of innovative instructional strategies, see Feinman & Feldman, *supra* note 5, at 882, 895-900, 906-12.

27. In what I interpret as a telling sign of the state of assessment practices in legal education, few law faculty have chosen to write about law school examinations and other criticism, evaluation, and ranking processes. For three welcome exceptions to the rule, see Feinman & Feldman, *supra* note 5, at 918-25; Kissam, *Law School Examinations*, *supra* note 10, *passim*; and Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411 (1977). One (former) law professor wrote a two volume work to assist law faculty with the examination process and examination drafting. M. JOSEPHSON, LEARNING AND EVALUATION IN LAW SCHOOL (1984).

28. *See* source cited in *supra* note 25.

29. INTERIM REPORT, *supra* note 21, at 16.

30. Nickles, *supra* note 27, at 440. *See also* Feinman & Feldman, *supra* note 5, at 898.

31. Feinman & Feldman, *supra* note 5, at 898; Nickles, *supra* note 27, at 443.

32. One article criticizing the lack of assessment criteria states:

In practically every respect, legal education fails to provide adequate criti-

assessment.[33]

Our continued study of learning theory sharpened our ability to recognize weaknesses in, and expanded our imagination for finding alternatives to, traditional teaching practices.[34]

II. Lessons from Learning Theory

A. *The Lessons—Traditional and Alternative Approaches to Learning and Teaching*

Educating ourselves about traditional and alternative explanations of learning and approaches to teaching profoundly affected our sense of the possibilities for what and how students learn. Throughout this century, critics have directed their harshest criticism of traditional legal education at its mission—its fixation with the rationalist dimension of lawyering[35]—and its accompanying

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> cism. . . . Students are seldom told with any precision what elements of knowledge or skill they should be learning and precisely how the instructor will measure their performance of those elements. . . . At best, the professor will only have hinted at the required standard of performance.

Feinman & Feldman, *supra* note 5, at 919-20. *See also* Kissam, *Law School Examinations*, *supra* note 10, at 456; Kissam, *Seminar Papers*, *supra* note 8, at 347; Nickles, *supra* note 27, at 454, 466-69.

33. "Is there any education theorist who would endorse a program that has students take a class for a full semester or a full year and get a single examination at the end?" D'Alemberte, *Talbot D'Alemberte on Legal Education*, A.B.A. J., Sept. 1990, at 52. The evaluation afforded law students is too little, too late. A single comprehensive examination leaves students ignorant of their understanding or progress during their learning process, and it offers no opportunity to improve their process or product by receiving, discussing, and assimilating an assessment of their strengths and weaknesses.

Assessment practices and student/faculty ratios appear to be connected.

> Look at the accreditation standards at a community college nursing program, or dental-hygienist program. None of these programs would be accredited if the teaching resources were not better than the best American law school. In other words, if you had a 12:1 student/faculty ratio, you wouldn't get accredited for a nursing school.

Id.

Further, essay examinations test knowledge of doctrine and analytical skill; they are entirely unsuited to measuring the development of transformational skills. The recent trend to use "objective" or "multiple choice" tests, although it has other virtues, does less to allow students to demonstrate their mastery of transformational skills.

The term "transformational skills" comes from Mudd, *Beyond Rationalism*, *supra* note 3, at 203-04. "Skills of transforming are those abilities and techniques of performance that in recent years have been the object of clinical education." *Id.* at 204.

34. I thank John Mudd for involving me in the Academic Planning Project. It turned out to be not just a most collegial and stimulating enterprise but also one that expanded my professional imagination.

35. *See* Legal Education and Lawyer Competency: Curricula for Change (F. Dutile ed. 1981) and authorities cited therein; Mudd, *Beyond Rationalism*, *supra* note 3, and authorities cited therein, especially on pages 189-90. In his article, Mudd is careful to alert his readers to his concern with the vocational dimension and objectives; he does not address "who

content—legal doctrine and theory. That explains, I believe, why the most heartily endorsed cure for the ills of traditional legal education is to integrate skills training into the academic programs at law schools. At most law schools, skills training is a response to the content criticism, *i.e.*, law schools are not teaching *what* they should be teaching. Our faculty has decided that what is to be taught (the curriculum) is best settled by reference to what lawyers do. Professor Munro's article details our process of converting to a performance-referenced academic program and our painstaking and continuing attempts to select and characterize the specific lawyering tasks (what we call competencies) we want our students to master before they graduate.[36]

At this law school, changing methodology, including our Law Firm Program, is a response to our appreciation for *how* students learn rather than simply a concern with *what* students learn. Inquiry into *how* to enable students to perform lawyering tasks competently is best informed not by reference to what lawyers do but by reference to learning theory.[37]

Learning theory speaks to learning processes, the roles of students and teachers, and classroom environments and dynamics. Although learning theory has received considerably less attention than the possibly misguided and definitely circumscribed mission of traditional legal education (to train students to think like lawyers), learning theory forecasts equally profound changes in the methodologies of traditional legal education.[38] Without reviewing those theories in any detail, I want to explain the learning principles that have persuaded me that the Socratic method[39] and its

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ought to teach which aspects of lawyer performance and *how the teaching should be done.*" *Id.* at 205 (emphasis added). He does distinguish these questions for the reader.

36. Competencies are "express statements of common legal transactions that the faculty has identified as essential to entry-level practice in a rural state like Montana." Munro, *supra* note 21, at 352.

37. I use the term "learning theory" loosely here to include research findings from many disciplines or fields, *e.g.*, epistemology, cognitive psychology, history of science, sociology of science, business, speech communication, and education.

38. Although unusual, our concern with methodology and our study of learning theory are by no means unique. Jay Feinman and Marc Feldman embarked on an intensive educational adventure when they designed and taught a "pedagogically and conceptually innovative course in contracts, torts, and legal research and writing—'Contorts' . . . ." Feinman & Feldman, *supra* note 5, at 875. They hope for and advocate a profound change in traditional legal education; indeed, they propose "a new consciousness of law, lawyering, and learning." *Id.* at 877.

For an example of a more contained, but nonetheless worthwhile, use of learning theory, see McDonnell, *Joining Hands and Smarts: Teaching Manual Legal Research Through Collaborative Learning Groups*, 40 J. LEGAL EDUC. 363 (1990).

39. The literature on legal education is replete with descriptions of the Socratic method. In law school, the Socratic method is inseparable from the "case method." The case

close relatives, the lecture and demonstration, are not equal (by themselves) to the job of training novice lawyers. I then want to describe our law firm program, a versatile and inexpensive task structure,[40] that fits both a performance-referenced curriculum (Part II) and a professional writing program (Part III).

Learning theory makes plain that a law school that expands its mission to prepare its students to enter the world of lawyering in all its dimensions must inevitably expand its repertoire of task structures beyond the Socratic method. However effective (or not) the Socratic method is for promoting the development of analytical ability,[41] it is demonstrably unsuited to performance-referenced legal education, to contexts in which students work at the other

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method involves "the professor and a large number of students analyzing appellate decisions, primarily in terms of doctrinal logic." R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 53 (1983). According to Stevens, the case method "became entangled with the question-and-answer technique, similar in purpose and form to the traditional law school 'quiz,' a merger that rather pretentiously came to be known as the Socratic method." *Id.*

Increasing data suggests that law professors do not employ, and in fact may never have employed, the authentic Socratic method:

> This traditional idea [an open ended, intellectually challenging Socratic dialogue between a law teacher and her students], however, may never have been implemented as widely in American law schools as we have thought. More importantly, mounting evidence today indicates that the communication in large law school classes consists mostly of teachers talking to students, whether by lecture, by the teacher's "Socratic monologue," or by the use of precisely pinpointed teacher questions.

Kissam, *Thinking*, *supra* note 8, at 147 (citations omitted).

40. "Task structure" is a term of art in learning theory.

> The task structure refers to the many ways in which the teacher (or students themselves) sets up activities designed to result in student learning. A teacher may choose between lecture, individual seatwork, or group seatwork; unitary, subgrouped, or individualized instructional pacing; written or oral students responses; frequent or infrequent tests; and so on.

R. SLAVIN, COOPERATIVE LEARNING 1 (1983).

Most criticism of the principal task structure of legal education, the Socratic method, has come from "outsiders." *See infra* note 86.

41. The avowed purpose of the Socratic method is to develop and refine analytical abilities. Its adherents tout its success. For example, in positive contrast to the standard lecture format, the Socratic method allegedly invites students to participate more actively in their learning process and to develop an analytical approach rather than to memorize information.

> The learning principle might be called vicarious participation. Even when not called upon in class, students try to answer the question in their own minds. The reasoning process guided by the professor can be *internalized* so that students consciously attempt to compare or distinguish case holdings as they read on their own. The contrast with classroom lectures is impressive: Using a Socratic approach, students develop a habit of mind with which to examine any legal issue; hearing a lecture, a student memorizes certain facts that may or may not thereafter be forgotten.

J. SELIGMAN, THE HIGH CITADEL 155 (1978) (emphasis added).

three dimensions of lawyering (transformational skills, perspective, and character). For example, without question, the large student/faculty ratio[42] and vicarious participation characteristic of the Socratic, lecture, and demonstration methods are irreconcilable with genuine "skills training." Simply put, "skills can only be developed by use."[43] Again, "[t]here is only one way to acquire skills and abilities, and that is to practice them."[44]

The insistence that students practice skills is consistent with what we now know about how people learn. In the past, however, learning theorists believed that "knowing" and "doing," that acquiring knowledge and developing skills, were passive and separate processes. Teachers did the work, not students: teachers conveyed knowledge that students copied down (the copy theory), and teachers modeled skills that students observed and later imitated (the modeling theory). Traditional teaching practices, *e.g.*, lectures and demonstrations, were based on the "copy" theory and the "modeling" theory.

The copy theory of learning and the lecture method of teaching are intimately connected. According to the copy theory, teachers transmit knowledge to students; students absorb the knowledge that teachers dispense. "[A] student leaves the classroom with a copy of the knowledge presented by the teacher. . . . [K]nowledge reaches the mind of the student in essentially the same form as the teacher presents it."[45] The more clearly the teacher delivers the information and the more exactly the student captures the information presented, the better the learning. The copy theory assumes that students are mere sponges waiting to soak up what teachers present or empty vessels waiting to receive deposits of knowledge from teacher-experts.[46] According to the copy theory,

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42. The most significant attribute of the Socratic method
> may be its high student/faculty ratio and resulting low cost. Student/faculty ratios for law schools commonly run at least 25 to 1, while other graduate departments on the same campuses maintain ratios of six or seven students per professor. . . . [T]he high student/faculty ratio seriously impedes the legal education needed today. Large classes restrict student contact with professors and other students, hinder frequent and accurate evaluation of student progress, and lead to a passive and impersonal educational experience; whereas law practice is both active and personal.

INTERIM REPORT, *supra* note 21, at 16.

43. Bouton & Rice, *Developing Student Skills and Abilities*, in LEARNING IN GROUPS 32 (C. Bouton & R. Garth ed. 1983).

44. Bouton & Garth, *Students in Learning Groups: Active Learning Through Conversation*, in LEARNING IN GROUPS, *supra* note 43, at 79.

45. *Id.* at 75.

46. Brazilian educator Paulo Freire has a different name for the copy theory of learning. He calls the same phenomenon the "banking concept of education":

the presentation of the knowledge is the critical feature of the educational process.

Learning theory today shifts the focus from teaching to learning and tells us that learning is a more active process than formerly supposed. Students must participate actively in their learning. "In studies of learning, in epistemological writings, in cognitive psychology, and in the studies of college-level teaching effectiveness, there is an increasing perception of learning as a constructive process that conflicts with the traditional notion of teaching as transmission of knowledge to students."[47] First, students own a life history with personal experiences that they bring to any educational effort and through which they filter and translate all information teachers present.[48] Second, students construct knowledge from their interaction with the material, the teacher, and other students. Rather than admitting received wisdom into their reservoir of knowledge, students evaluate what they hear. By comparing what they hear with what they already believe, by comparing what they believe with what others believe, by using what they believe to do something, students come to accept or to know. By listening to others, by speaking their own ideas, by hearing themselves as well as others, by testing their ideas as they present and defend them to others, students come to trust their own judgments.

The copy theory of learning attempts to explain how students acquire knowledge; the modeling theory of learning attempts to explain how students develop skills and abilities. The modeling theory assigns teachers the role, not of transmitter, but of exemplar or ideal, which students are to imitate or duplicate. "[T]he teacher

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> Education thus becomes an act of depositing, in which the students are the depositories and the teacher is the depositor. Instead of communicating, the teacher issues communiques and makes deposits which the students patiently receive, memorize, and repeat. This is the "banking" concept of education, in which the scope of action allowed to the students extends only as far as receiving, filing, and storing the deposits.

P. FREIRE, PEDAGOGY OF THE OPPRESSED 58 (1970).

47. Bouton & Garth, *supra* note 44, at 75.

48. I cannot resist quoting the following paragraph because I believe it captures so well what faculty know but do not acknowledge as we persist in some form of lecturing day after day.

> What the student listening to a lecture actually hears is not a copy of what is said; it is a construction. Listening, like all forms of perception, is an effort after meaning. This meaning is achieved by connecting what is encountered in any situation with what the person has brought into the situation. . . . What a listener hears is a reconstruction based on the knowledge, experience, interests, and emotions that the listener brings to the experience. In this process, the original message is altered, the logical connections change, some parts are screened out, other parts are changed beyond recognition, and even additions are made.

Id. at 75-76.

'models' the abilities that the students are to acquire and that students will later be able to imitate what they have observed. . . . By repeated observation, the student . . . internalizes these procedures and acquires these abilities."[49] Unfortunately for traditional legal education, current research on learning has identified at least two fatal flaws in the modeling theory. Its most significant flaw is that it highlights only one stage of the learning process, the modeling/observation stage, and ignores the other two stages. The modeling theory is blind to the performance and criticism/evaluation[50] (or assessment) stages of learning.

> To be effective, modeling *must* be followed promptly by opportunities for students to practice the behavior that is modeled, and by feedback on their practice. In the traditional method of teaching, students seldom have an opportunity to practice procedures and abilities displayed by the teacher or to get feedback on their performance.[51]

The task structures of traditional legal education—the Socratic, lecture, and demonstration methods—share the failure to allow each student to perform desired behaviors and to provide students with criticism on and evaluation of their performances.[52] Each of these additional steps is indispensable to learning.[53] Law

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49. *Id.* at 78.

50. Feinman and Feldman distinguish criticism from evaluation:

> *Criticism* is the process by which a knowledgeable person assesses the strength and weakness of a student's work. The instructor analyzes a student product—oral response, exam answer, memorandum of law—and points out its correct and incorrect elements, its good and bad aspects. *Evaluation* is the process of measuring student work against a standard. In law school, the standard should be capable professional work or, more realistically, work that shows promise of the student's becoming a capable lawyer.

Feinman & Feldman, *supra* note 5, at 919 (emphasis added). I think the distinction is important and helpful. I use the term "assessment" throughout this article, however, to refer to both components because the "grading" or "assessment" process is not a central focus of this article.

51. Bouton & Garth, *supra* note 44, at 79 (emphasis added). In the context of improving his students' abilities to do legal research, McDonnell spotted the same flaw in the modeling theory.

> By observing a model carefully, one can attempt to transfer its attributes to one's own behavior. But reading, listening, observing a model, and discussing the skill in class are only intermediate steps toward learning the skill. "At some point, the student who has studied and observed the skilled model performer must . . . '[try to] imitate the response of the model.' "

McDonnell, *supra* note 38, at 364 (citations omitted).

52. As Mudd and LaTrielle noted, "Performance skills can be assessed only in actual performance." Mudd & LaTrielle, *supra* note 3, at 28.

53. One article discusses the indispensability of criticism to learning:

> Criticism is the essential component of grading for student learning. Students learn only to the extent that their learning is tested and measured by a critical

faculty are only beginning to appreciate the importance of these steps and to design methods to accommodate them.

The second flaw in the modeling theory of learning is that the quality or sophistication of the teacher's performance almost always exceeds the narrow interval between what the students already know and what they can learn by approach in a successive stage.[54]

> Modeling can be effective only if the teacher is able to determine students' abilities accurately and if the teacher can confine the modeling to what slightly exceeds students' current abilities. A slightly more advanced student in a learning group is a far more effective model than the teacher can be.[55]

The Socratic, lecture, and demonstration methods also share this second flaw: the professor's, or classmates', ability is often beyond the reach of other students.[56]

Current learning theory dictates that not only must students use and practice skills to become proficient at them, but also students must practice the specific lawyering tasks defined by a law school as essential to competency. Students must be permitted to practice these skills in every performance-related area because "transference, the ability to apply concepts and skills learned in one context to a different context, does not occur automatically."[57]

> observer. There is no meaningful sense in which one can be said to have "learned" to brief a case, apply a doctrine, or make an argument, without that learning being subjected to critical assessment.

Feinman & Feldman, *supra* note 5, at 919.

54. Bouton & Garth, *supra* note 44, at 78.

55. *Id.* at 79.

56. The Socratic method and the lecture format share other features as well. For example, both formats: (1) highlight the teacher as expert, (2) relegate the majority of students to a passive or observer role (or at best a vicarious participant role), (3) treat knowledge as separable from the ability to perform a task, (4) require that the teacher "pitch" the content of class to a level that the majority of students can comprehend (while ignoring or neglecting the rest of the students), and (5) consider irrelevant the life experiences of the students before they enter the classroom.

57. Mudd, *Beyond Rationalism*, *supra* note 3, at 201. Mudd applies the general concept to legal education:

> The work of lawyers requires good writing, for instance, but writing is demonstrated in specific settings. From a pedagogical standpoint, *the context or task in which the ability is used is of central importance.* The skill of preparing an office memorandum does not automatically translate into the ability to draft an effective contract or will. Similarly, if a teacher wishes to improve the oral skills of his students, he may have them recite in class or deliver an appellate argument. But he cannot assume that the general oral skill developed in these contexts will be adequate for trying a jury case. If it is important that students know how to draft contracts or try jury cases, they *must* practice the general skills of written and oral communication in those *particular contexts.*

Id. (emphasis added).

Becoming adept at a specific task requires performing that very task. The opportunity to perform and practice, in context after context, specific skills and tasks, with individual and repeated assessment, rather than the opportunity to discuss and observe demonstrations of lawyering tasks, is essential to enable students to become proficient at those tasks.

Learning theory also takes account of the relationships between teacher and student and between student and student and examines the dynamics in the classroom. Consistently with the copy theory, the only important relationship in the classroom is between teacher and student, supplier and recipient of knowledge. Consistently with the modeling theory, the only important relationship in the classroom is between teacher and student, ideal or example and replica. According to both theories, classmates hold no pedagogical value for one another; each student is educationally autonomous.[58] Interaction, cooperation, and collaboration among classmates or peers are useless to the learning process; students have nothing to teach or learn from one another. The assumptions inherent in the copy and modeling theories, if true, demand that only experts should be teachers and that students can safely ignore one another. Such assumptions, if false as they increasingly appear to be, should no longer impede the development of task structures that recognize that students can teach and learn from one another while simultaneously remaining responsible for teaching themselves.

According to both the copy theory and the modeling theory of learning, the exclusive purpose of communication in the classroom is to transmit information from expert to novice;[59] not to encourage learners to make sense of or construct knowledge for themselves and with others. Because mounting evidence intimates that rather than absorbing knowledge that teachers transmit, learners actually construct knowledge,[60] and that they construct knowledge socially,[61] in conjunction with others, task structures that stimulate student activity—in particular speaking and listening, writing and reading—and involve cooperation advance learn-

58. "[S]tudents receive and assimilate knowledge individually, independently of others." Bouton & Garth, *supra* note 44, at 77.

59. "Communication [in the classroom] functions to transmit knowledge from those who have it to those who do not." *Id.*

60. *See e.g.*, M. BELENKY, B. CLINCHY, N. GOLDBERGER, & J. TARULE, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND 15, 131-52, 176-89 (1986) [hereinafter WOMEN'S WAYS OF KNOWING]; A. GERE, WRITING GROUPS: HISTORY, THEORY, AND IMPLICATIONS 69-73 (1987); Bouton & Garth, *supra* note 44, at 75.

61. *See* A. GERE, *supra* note 60, at 72-76.

ing. "We only come to know something when we are able to find words that make sense to ourselves and others."[62]

As the discussion above may suggest, our conceptions about the very nature of learning and knowledge[63] are in flux. A law school wanting to design a performance-referenced academic program must articulate its conceptions of students and teachers and their roles, and the learning process itself.[64] To date, educators' reliance on lecture and demonstration methods as the dominant educational task structures derives from conceptions of the learning process and its participants that rest upon four discarded assumptions: (1) Teachers deposit knowledge into students; (2) teachers model abilities and skills that students can imitate if they observe closely and carefully; (3) the relationship between teacher and student "counts"; relationships between and among students in the classroom are irrelevant to learning; and (4) experts talk in the classroom to convey knowledge; students need not talk to learn. Changing conceptions of student and teacher, of the learning process, and task structures explain why the Socratic, lecture, and demonstration methods are inadequate to train novice lawyers. At the very least, legal education needs to experiment with one or more task structures that demand that students work with and make sense of the material for themselves and with classmates, and that allow students to practice specific lawyering skills and tasks. Recognizing the principal role that students play in the learning process, law faculties committed to performance-referenced legal education must invent *learning* activities that insist upon student performance. Legal education needs to concentrate

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62. *Id.* at 78.

63. *See, e.g., id.* at 69-76; Trimbur, *Collaborative Learning and Teaching Writing*, in PERSPECTIVES ON RESEARCH AND SCHOLARSHIP IN COMPOSITION 93-94 (B. McClelland & T. Donovan ed. 1985). *See also* WOMEN'S WAYS OF KNOWING, *supra* note 60, *passim.*

One composition teacher characterizes the conception of knowledge arising from collaborative learning as follows:

> So the entire class and the teacher negotiate the answer or answers to the question raised—that is, together they create the knowledge that is learned during the session. Knowledge, in this context, is not being defined as "fact" handed down by an authority figure; instead, it is something fluid that the group and the teacher create during their interaction. In other words, knowledge is a social artifact in a collaborative class . . . .

Stanger, *The Sexual Politics of the One-to-One Tutorial Approach and Collaborative Learning*, in TEACHING WRITING: PEDAGOGY, GENDER, AND EQUITY 31, 42-43 (C. Caywood & G. Overing ed. 1987).

64. Two law professors attempted (and recommend that other law faculty attempt) an even more comprehensive assignment: "We believe that only by constructing a new consciousness of law, lawyering, and learning can law schools perform their most basic task: the training of competent lawyers." Feinman & Feldman, *supra* note 5, at 877.

on improving the learning process, not the teaching process. "Like many others, I prefer to think of the study of law as a matter of *learning*, with emphasis on a student's active work in acquiring skills and knowledge, rather than as a matter of *teaching*, with emphasis on the teacher's active role dispensing goods to passive students."[65]

B. The Practice—Learning Groups

From the first day of classes, each of our first-year students belongs to a "law firm,"[66] a group of six or seven students whom we call "associates," guided by a specially trained[67] upper-class student, the "junior partner."[68] "Senior partners," faculty teaching first-year courses, design and monitor firm activities. Law firms meet twice a week for approximately two hours per meeting throughout first semester. They meet less often during second semester.

Law firms are learning groups.[69] They are a powerful and versatile form of active and collaborative learning.[70] Advocates of collaborative learning methods claim, with increasing evidence to support the claim, that "learning groups work—that is, they enhance

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65. Kissam, *Thinking*, *supra* note 8, at 166 (emphasis in original).

66. Other law schools have adopted some version of a "law firm" program. *See, e.g.*, Braveman, *Law Firm: A First-Year Course on Lawyering*, 39 J. LEGAL EDUC. 501 (1989); Moliterno, *The Legal Skills Program at the College of William and Mary: An Early Report*, 40 J. LEGAL EDUC. 535 (1990). Other law faculty have discovered the virtues of small group learning. *See, e.g.*, Feinman & Feldman, *supra* note 5, at 907-09; McDonnell, *supra* note 38, *passim*; Reed, *Group Learning in Law School*, 34 J. LEGAL EDUC. 674 (1984).

67. The faculty supervisor of the Law Firm Program organizes a three-day training program for the junior partners. The training program includes an introduction to the dynamics of small groups. I thank Professor Janet Wollersheim, University of Montana Department of Psychology, for her annual trek across campus to the Law School to share her expertise on small group dynamics and her sensitivity to the idiosyncrasies of law students and life in a law school.

68. The "junior partners" have turned out to be the heros of the Law Firm Program. Since the program began, more than one hundred upper-division students have served as junior partners. They work closely with the first-year students, taking the welfare of their "associates" to heart. We have been exceedingly blessed to find ourselves a law school community with such caring and responsible students.

69. The term "learning group" is general and inclusive, covering such labels as "cooperative learning, collaborative learning, collective learning, study circles, team learning, partner learning, study groups, peer support groups, work groups, learning community, self-help groups, and community education circles." Bouton & Garth, *Editors' Notes*, in LEARNING IN GROUPS, *supra* note 43, at 2.

70. The following are excellent resources on collaborative learning: LEARNING IN GROUPS, *supra* note 43; FOCUS ON COLLABORATIVE LEARNING (J. Golub ed. 1988); WOMEN'S WAYS OF KNOWING, *supra* note 60; A. GERE, *supra* note 60; R. SLAVIN, *supra* note 40; Bateson & Kunz, *Cooperative Learning Techniques for Legal Research and Writing Courses*, in 2 INTEGRATED LEGAL RESEARCH 1 (1990) (newsletter published by Mead Data Central, Inc.).

learning—irrespective of the type of institution, type of student, level of education, or subject matter. . . . Learning groups seem to increase both the efficiency and the effectiveness of learning."[71] Champions of learning groups reject earlier opinions that "knowing" and "doing," that acquiring knowledge and developing skills, are separate and passive processes. Instead they believe that "content and skills cannot be separated; both are part of a single learning process. Knowledge that goes beyond mere information is always of how to do something, and skills can only be developed by use."[72] They reject the learning principles supporting traditional teaching practices and in fact believe just the reverse: (1) learners "construct" knowledge;[73] (2) developing skills and abilities is an "integral part" of constructing knowledge;[74] and (3) learning is a social and not a solitary process.[75] As learning groups, the law firms are ripe with possibilities for legal education.

The law firms are ideally suited to an academic program that connects professional education to professional action—one that educates for good performance. Unlike the Socratic, lecture, or demonstration methods, learning groups allow students to practice lawyering in all its dimensions and to do so in a context that resembles practice. So long as law firm activities involve *structured* tasks that call for *active* student participation and *conversation*,[76] those activities can simultaneously enhance cognitive learning, foster skill development, stimulate the gaining of perspective, and permit formal pedagogical attention to character and interpersonal skills.

Currently, in our school, law firms accommodate a variety of skill-oriented activities for first-year students. For example, in

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71. Bouton & Garth, *Editors' Notes*, *supra* note 69, at 4. The claim continues: "Indeed, learning groups promote the broad liberal education goals that are often more honored by educational rhetoric than pursued in classroom practice—specific information and content, general disciplinary concepts, generic cognitive abilities, interpersonal skills . . . and understanding of how to learn." *Id.*

72. Bouton & Rice, *supra* note 43, at 32.

73. Bouton & Garth, *supra* note 44, at 75.

74. *Id.*

75. *Id.* at 75-77.

76. Bouton and Garth state:

> [E]ffective learning groups seem to have two major elements: first, an active learning process promoted by student conversation in groups; second, faculty expertise and guidance provided through structured tasks. That is, it is not sufficient to increase discussion among students, and it is not sufficient to replace listening to lectures with problems for students to work on. Both elements—structured tasks and interaction among peers—seem to be necessary for the true power of learning groups to be realized.

Id. at 73.

their law firms, first-year students interview simulated clients, negotiate with classmates as opposing attorneys, and rehearse various parts of a simple bench trial they conduct in their first year. Because all students can practice skills exercises repeatedly and comment on one another's performances, law firms are particularly apt for allowing students to practice transformational skills. Although classmates are almost invariably less knowledgeable than faculty or practicing attorneys[77] about technical legal matters—the rules of evidence, for example—classmates are closer in time and expertise to clients and jurors, two of the authentic audiences of lawyering performances.[78] That closeness lends a legitimacy to the perceptions of classmates.

Law firm activities also attest to the potency of cooperative learning, even in an environment usually hostile to anything but individualistic and competitive learning. For example, early in their first semester, students take up, exchange opinions about, and then reach a group consensus on discussion problems raising difficult social issues.[79] Past discussion problems have asked students to discuss and decide, as a group, whether (1) a district or county attorney should prosecute a man for allegedly aiding his spouse, afflicted with Alzheimer's disease, to commit suicide; (2) a hospital should perform a Cesarean section on an unwilling, terminally ill, pregnant woman,[80] and (3) United States senators should consider the judicial philosophy or political ideology of a nominee when deciding how to vote on that nominee to the United States Supreme Court. The discussion problems call for students to make public judgments, at least in front of a small group, and to get a sense of how to work cooperatively to analyze and reach consensus on a controversial issue. We also use the law firms as writing groups in which students collaborate on and respond to one another's written work-in-progress.[81]

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77. If the commentary by classmates is inadequate, student performances can be videotaped for later review by faculty or practicing attorneys who have special expertise.

78. *See* Stanger, *supra* note 63, at 38. "Collaborative learning replaces the artificiality of the traditional situation, where the students write exclusively for the teacher, with something that makes more sense—writing for the peer group." *Id.* In addition, expert instruction or assessment might go beyond what students are capable of assimilating so early in their legal education.

79. Most discussion problems are organized as problem solving exercises, with the students proceeding through a strictly prescribed set of steps ending in a collective recommendation to the hypothetical person requesting the discussion and decision.

80. This discussion problem was based on *In re* A.C., 573 A.2d 1235 (D.C. 1990).

81. *See* "Lessons from Composition Theory," *infra* Part III. See also H. SHAPO, M. WALTER, & E. FAJANS, WRITING AND ANALYSIS IN THE LAW: TEACHER'S MANUAL (2d ed. 1991), for a wonderful discussion of peer editing in legal writing courses. For more general discus-

Less teacher-centered than the Socratic, lecture, or demonstration methods, the law firm structure also allows for different "ways of knowing."[82] Intriguing studies in moral[83] and intellectual[84] development suggest that earlier models of such development were based on male-only samples and that, once studied, women presented alternative models of development.[85] Other evidence also suggests that some students experience the Socratic method as harsh, intimidating, repressive, even silencing.[86] As learning groups, law firms offer an alternative to the "debate" or adversarial nature of the Socratic method.[87]

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sions of collaborative writing, see FOCUS ON COLLABORATIVE LEARNING, *supra* note 70.

82. This expression comes from two books: C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) and WOMEN'S WAYS OF KNOWING, *supra* note 60. In *Women's Ways of Knowing*, the four authors—who worked collaboratively—contend that some people (in their research, women) experience different learning and teaching methods differently than other people do.

83. C. GILLIGAN, *supra* note 82.

84. *See, e.g.*, WOMEN'S WAYS OF KNOWING, *supra* note 60.

85. *See, e.g.*, Mielke, *Revisionist Theory on Moral Development and its Impact Upon Pedagogical and Departmental Practice*, in TEACHING WRITING: PEDAGOGY, GENDER, AND EQUITY, *supra* note 63, at 171.

86. "Outsiders" have criticized the task structure of traditional legal education.

> [T]he conventional curriculum denies alternative ways of learning. In legal education, the typical scenario is the debating of appellate opinions in a large class by means of the so-called "Socratic method." I have only two things to say about this method as used in law schools. First, it is the exact opposite of the real Socratic item, which is self-exploration facilitated in a generous and loving way. Second, the Socratic method and the case method persist, in my opinion, for purely economic reasons. With them, law schools minimize overhead with large classes, and make fear the primary motivation for (and I use the term advisedly) "learning." This process is especially harmful to women and people from other cultures, because legal education uses the technique of "separate knowing," as opposed to "connected knowing." Rather than involve ourselves in the real problems of real people, we look at a judicial "solution" to that problem, and engage in abstract adversarial debate about that solution's status within a doctrinal hierarchy.

Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 156-57 (1990). *See also* Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988); Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AMER. U.L. REV. 1141 (1985).

87. See Weiss & Melling, *The Legal Education of Twenty Women*, 40 STANFORD L. REV. 1299 (1988), for an indictment of the Socratic method as it affects women's participation in law classes. Unquestionably, the Socratic method involves the technique of "doubting." Apparently, some women experience "doubting" as inhibiting learning, not fostering it.

> But in the psychological literature concerning the factors promoting cognitive development, doubt has played a more prominent role than belief. People are said to be precipitated into states of cognitive conflict when, for example, some external event challenges their ideas and the effort to resolve the conflict leads to cognitive growth. We do not deny that cognitive conflict can act as an impetus to growth; all of us can attest to such experiences in our own lives. But in our interviews only a handful of women described a powerful and positive learning experience in which a teacher aggressively challenged their notions. . . .

The collaboration inherent in law firm activities also resembles the working style of professional life. Law firms permit students to "try on" the collaborative wardrobe of practice.

> Although much of a lawyer's work is done in collaboration with colleagues, legal training rarely explores the collaborative model of work. Not surprisingly, joint efforts are more often the souce [sic] of friction and discord than of satisfaction and enhanced professionalism. Perhaps the competitive tone that marks so much of legal education and practice carries over too readily into areas that are at least nominally supposed to be cooperative. . . . [M]ethods are available for helping individuals become aware of how they act in a group enterprise, including how close they are to a collaborative model of work and how their ability to work with others is influenced by competitive, accommodating, controlling, and submissive attitudes. In addition, individuals can be made more aware of how subtle group dynamics can interfere with effective joint functioning. One of the tasks of effective legal education could be the minimization of these hindrances to productive interaction.[88]

In addition to allowing students to explore "the collaborative model of work," adopting a small group format as a part of the formal academic program, and starting it as soon as first-year students arrive, may express an institutional ethic of care to counter the stereotype of law school as individualistic, competitive, and impersonal. This ethic of care includes mutual support and trust, sensitivity to different perspectives and approaches, and an enlarged sense of the possibilities and value of cooperation. Law firms, sufficiently directed and guided, can blunt the competitive culture of law school that appears to be universally experienced as hostile.[89]

> . . . On the whole, women found the experience of being doubted debilitating rather than energizing.

WOMEN'S WAYS OF KNOWING, *supra* note 60, at 227.

88. Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 528-29 (1978).

89. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 423-24 (1971). In part, the impetus for adopting the law firm program arose from our perception that our students found their transition to law school emotionally and intellectually difficult. Even in a school as small as ours, students adjusted to the educational system by quickly coming to believe that they were on their own. As support groups, the law firms have been hugely successful. First-year law students uniformly praise the law firm structure and their own teaching assistants. Law firms may succeed as support groups because they create a sense of belonging and connection in law schools, notorious for sponsoring autonomy and independence.

Apparently, one benefit of collaborative learning, in any of a variety of contexts, is that it helps ease the transition from the earlier community to the subsequent community.

> The emotional environment of the law school seems to have significant implications for the legal profession, not only with respect to the ways in which students react to different teaching methods and master what is taught in the law curriculum, but also in relation to qualities of character which may later affect their ability to serve clients well, to behave ethically, and to exercise leadership and responsibility in the community.[90]

Many of our students work with clients immediately after graduation, without the guidance of a senior practitioner. Cultivating in students the sensitivities to represent clients effectively means the law school must assume responsibility for fostering in our graduates an ethic of care and the interpersonal skills to act consistently with that ethic of care. Unlike individualistic or competitive learning techniques, collaborative learning modes demand social as well as intellectual skills. For example, genuine collaboration requires communication, trust-building, decision-making, and conflict management skills.[91]

III. Lessons from Composition Theory

A. *Writing as Cognitive Process*

The last twenty years have brought changes not only in theories of knowing, learning, and pedagogy, but also in theories of

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> Collaborative learning, however, seemed to offer a method to overcome the separation of learning and social experience in traditional education. Learning in groups . . . is often more effective than learning individually because learning involves more than simply acquiring new information. It also involves the acceptance of new habits, values, beliefs, and ways of talking about things. To learn is to change: learning implies a shift in social standing—a transition from one status and identity to another and a reorientation of social allegiances.

Trimbur, *supra* note 63, at 90.

90. Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 Cornell L. Rev. 221, 295-96 (1974), *quoted in* Himmelstein, *supra* note 88, at 536.

91. Bouton & Garth, *supra* note 44, at 80.

> The learning group method increases the complexity of interaction among students, and it empowers a greater range of behavior than the traditional classroom does. In addition to purely cognitive activity, a number of other functions—decision making, leadership, mutual assistance—must be performed. . . .
>
> Interpersonal skills cannot be dismissed as something that can be learned adequately outside the classroom. The classroom learning group provides a unique context in which students can develop interpersonal skills. The teacher can act as a neutral observer of group interaction and provide feedback to group members. The learning group provides a situation that is rarely encountered, in which members work on a task and continuously reflect on how they are working together. The situation as a whole provides a context in which individuals can both become aware of their own behavior and feel secure enough to explore and practice new behavior.

Id.

composition and composition pedagogy. Current composition theory asserts that students are the principal actors in their own learning and in the learning of other students as readers, collaborators, and critics. Theories of legal writing and legal writing pedagogy have not kept pace.[92]

Still generally trivialized as a mere skill in contrast to "thinking like a lawyer," legal writing is usually considered not sufficiently theoretical for academic study, not worthy of a share of the scarce resources available to the academic program, and more appropriately postponed until the real world of practice. Some writing professionals, ahead of their time, insist that legal writing, far from being a mere skill, is itself a form of legal reasoning, impossible to distinguish or segregate from the reasoning process practiced in substantive law courses. If this judgment is accurate, legal writing is not only a professional skill, it is a cognitive process as well. A law professor and author of several articles about legal writing, Phillip Kissam, argues that "there are two basic dimensions to the writing process: the 'instrumental' and the 'critical' dimensions. Instrumental writing is designed to convey independently conceived ideas in a written form. Critical writing, by contrast, involves the writing process itself as an important source of substantive thought."[93]

The content and methodology of most legal writing programs do not reflect the judgment that writing is a cognitive process as well as a professional skill. Practical and political reasons buttress the current ideology that writing is merely a skill and merely one of many lawyering skills. The most frequently offered pragmatic reason law schools give for failing to design and staff legal writing programs adequately is "that the limited funding of law schools, which has produced relatively high student/faculty ratios by comparison to other university graduate departments, makes it impractical for overburdened law professors (or anybody else for that matter) to provide much writing experience for their students."[94] One of the most widely accepted political reasons is "that the

92. Articles by Teresa Godwin Phelps are notable exceptions to the assertion that theories of legal writing and legal writing pedagogy lag behind general composition theory. *See, e.g.*, Phelps, *Legal Rhetoric*, *supra* note 7; Phelps, *Strategies*, *supra* note 9. Phillip Kissam has also begun to spin theory about legal writing and legal writing pedagogy. *See, e.g.*, Kissam, *Thinking*, *supra* note 8.

93. Kissam, *Thinking*, *supra* note 8, at 136. Other experts agree. For example: "[W]riting is not separate from thinking: rather, it is one of the best tools for exploring and analyzing ideas, an intrinsic part of learning any conceptual subject matter." Goulston, *Women Writing*, in TEACHING WRITING: PEDAGOGY, GENDER, AND EQUITY, *supra* note 63, at 26.

94. Kissam, *Thinking*, *supra* note 8, at 141.

proper experts for teaching writing to lawyers are English teachers, who are expected to perform this function in the schools and colleges that students attend prior to law school and—perhaps—in remedial writing classes in law school."[95] Although these rationales are not sheer pretext, I believe that our fundamental *theoretical* misconception of the writing process is principally responsible for the current state of legal writing programs. By seeing writing as a mere skill, law schools often ignore the opportunity to teach writing effectively and "to employ the writing process as an effective learning device."[96]

I attribute the failure to see legal writing as a cognitive process as well as a professional skill, and to design and staff legal writing programs accordingly, to the fact that many of us who teach legal writing are not well-grounded in the teaching of composition.[97] As a result, we do not bring to our jobs the expertise of composition theorists and teachers. Thus, as we design our legal writing pro-

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95. *Id.*

96. *Id.* at 142.

97. Interestingly, legal writing teachers share that characteristic with those responsible for teaching composition skills in college.

> [T]he overwhelming majority of college writing teachers in the United States are not professional writing teachers. They do not do research or publish on rhetoric or composition, and they do not know the scholarship in the field; they do not read the professional journals and they do not attend professional meetings . . .; they do not participate in faculty development workshops for writing teachers.

Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 78-79 (Feb. 1982).

I am not accusing those who teach legal writing of incompetence or a failure of caring. I suspect that the minority of legal writing teachers, like "few lawyers, have received writing instruction beyond a freshman English composition course . . . and perhaps a legal writing and research course in the first year of law school." Phelps, *Strategies*, *supra* note 9, at 155.

More importantly, structural features of law schools and academic programs are responsible, I believe. Apparently, those same features may explain why college composition teachers are not professional writing teachers.

> In the first place, they [English department administrators] may believe that they have so many writing classes to staff that they could not possibly hire well-qualified professionals to teach them; only a comparatively few such specialists exist. Second, most departmental chairpersons don't believe that an English instructor needs special qualifications to teach writing. As one of my colleagues says, our department wouldn't think of letting her teach Chaucer courses because she is not qualified; yet the chairman is delighted for her to teach advanced composition, for which she is far more unqualified. The assumption is that anyone with a Ph.D. in English is an expert writing teacher.
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> . . . [T]he people who do most to promote a static and unexamined approach to teaching writing are those who define writing courses as service courses and skills courses . . . . Such a view . . . denies that writing requires intellectual activity and ignores the importance of writing as a basic method of learning . . . . People who teach skills and provide services are traditionally less respected and rewarded than those who teach theory . . . .

Hairston, *supra*, at 79.

grams and teach our legal writing courses (and attempt to educate our colleagues and deans), we unwittingly fall prey to the assumptions of what some call the traditional paradigm of composition instruction. The most influential and misguided precepts of the traditional paradigm are: (1) "the emphasis [is] on the composed product rather than the composing process";[98] (2) "competent writers know what they are going to say before they begin to write";[99] and (3) "teaching editing is teaching writing."[100]

Subscribing unknowingly to the traditional paradigm, legal writing teachers concentrate on product: if we design writing assignments well, instruct our students clearly and explicitly on their assignments, and then comment comprehensively and constructively on the students' final products, we have performed our job effectively, or at least as well as we can. By misplacing our attention on product rather than process, we fail to find ways to empower our students to learn to do well, and understand, what we ask of them. For years, I taught "rules": grammar rules, format rules, citation rules, even assessment rules, and tried to describe for my students the characteristics of the "ideal" product. I failed to address process. What, after all, was there to say about process?

As do most legal writing professors, I required that students generate legal writing "products," (*e.g.*, letters to clients, internal office memoranda of law, and appellate briefs). I instructed students in large lectures about the purpose and format of those legal writing products. I collected the papers on the due date, read the papers, marked them up[101] according to the assessment criteria I distributed and discussed in class, and assigned each paper a grade. I also met with students in conferences to explain my comments or answer questions. Rather than praise my hard work [notice all that *I* had done], the students cynically concluded that they were writing only for the teacher [according to arbitrary rules;

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98. Hairston, *supra* note 97, at 78 (quoting R. Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, in RESEARCH IN COMPOSING 31 (C. Cooper & L. Odell ed. 1978)).

99. *Id.*

100. *Id.* Two other relevant assumptions of the traditional paradigm are that "the composing process is linear, . . . it proceeds systematically from prewriting to writing to rewriting"; and "no one can really teach anyone else how to write because writing is a mysterious creative activity that cannot be categorized or analyzed." *Id.*

101. I now know I marked them up *too* much. *See, e.g.*, Bridges, *The Basics and the New Teacher in the College Composition Class*, in TRAINING THE NEW TEACHER OF COLLEGE COMPOSITION 13, 21-23 (C. Bridges ed. 1986) [hereinafter TRAINING THE NEW TEACHER]; Hairston, *On Not Being a Composition Slave*, in TRAINING THE NEW TEACHER, *supra*, 117, 119-22 [hereinafter Hairston, *Composition Slave*].

wherever did they get *that* idea?[102]], and that little of what they learned would serve them well in practice. To my disappointment and their additional frustration, few students were able to transfer the comments written on one paper to the next one they produced.[103]

Current research explains my experiences. Unfortunately, as more and more writing teachers are learning, our earlier assumptions were wrong, and the teaching of writing requires that we replace the earlier assumptions about the importance of product with more accurate ones: ones that focus on process. The principal precepts of the new paradigm for teaching writing, the "new rhetoric,"[104] are:

1. It focuses on the writing process; instructors intervene in students' writing during the process.
2. It teaches strategies for invention and discovery; instructors help students to generate content and discover purpose.
3. It is rhetorically based; audience, purpose, and occasion figure prominently in the assignment of writing tasks.
4. Instructors evaluate the written product by how well it fulfills the writer's intention and meets the audience's needs.

. . . .

[5]. It emphasizes that writing is a way of learning and developing as well as a communication skill.[105]

Were legal writing professionals to pay attention to these

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102. Teresa Phelps implies that the traditional paradigm encourages students to believe that "[g]rades are . . . subject to the vicissitudes of the teacher's unfathomable likes and dislikes . . . ." Phelps, *Legal Rhetoric*, *supra* note 7, at 1100. Another composition professor stated even more bluntly the students' perceptions of grading: "Knowing the rules meant success. Satisfying the instructor meant success. Not much else." Frey, *Equity and Peace in the New Writing Class*, in TEACHING WRITING: PEDAGOGY, GENDER, AND EQUITY, *supra* note 63, at 97.

103. This is one example confirming the theory that students must practice each skill in each context, often more than once. *See supra* notes 51 & 52 and accompanying text.

104. Phelps, *Strategies*, *supra* note 9, at 156 (citing Hairston, *supra* note 97, at 86).

105. Hairston, *supra* note 97, at 86. The list of precepts continues:

[6]. It views writing as a recursive rather than a linear process; pre-writing, writing, and revision are activities that overlap and intertwine.

[7]. It is holistic, viewing writing as an activity that involves the intuitive and nonrational as well as the rational faculties.

. . . .

[8]. It is informed by other disciplines, especially cognitive psychology and linguistics.

. . . .

[9]. It views writing as a disciplined creative activity that can be analyzed and described; its practitioners believe that writing can be taught.

. . . .

[10].It stresses the principle that writing teachers should be people who write. *Id.*

guidelines, legal writing programs would look different, I believe. Indeed, the current program at the University of Montana School of Law is dramatically different from the one of ten years ago.[106] Responding to the "process tenets" of the new rhetoric (and the lessons from learning theory discussed above) significantly affected both the content and instructional strategies of our legal writing program. For example, early on, we inform students about the writing process and ask them to observe and describe their own process.[107] Then, as the new rhetoric advises, we design exercises that give classmates and teaching assistants chances to intervene in the students' writing process.[108] When our students write their first internal office memorandum, we intervene in the writing process three times: (1) the students individually brief the cases that accompany the assignment and then, in their law firms, discuss their analyses of the cases with five or six classmates;[109] (2) the

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106. Our "new" program conforms to what composition specialists are advising for writing instruction:

> As composition specialists shared their findings, writing instruction in the class, too, shifted its emphasis from the prescriptive rules in the handbook to the context in which a piece was written—who the audience was, who the writer was, what the writer hoped to accomplish, when it was written, why it was written. Writing instruction also began to accommodate the actual stages of the writing process—by including time for students to generate ideas and revise drafts, even incubate, before turning in a final draft—components of writing instruction that were unheard of according to the old method, either because of unrealistic notions of what students would accomplish on their own or, more likely, the notion that a writer either had it or he or she didn't, either knew the rules or he or she didn't, and a series of drafts would make very little difference.

Frey, *supra* note 102, at 97.

107. Once one begins to "re-vision" writing, and legal writing, as a process rather than a product, the pre-writing and revising stages take on a greater significance. *See* R. NEUMANN, LEGAL REASONING AND LEGAL WRITING 46-50 (1990); D. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 146-53 (1989); M. RAY & B. COX, BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING 8-20 (1991); Phelps, *Legal Rhetoric*, *supra* note 7; Phelps, *Strategies*, *supra* note 9.

108. Teresa Phelps articulates the benefits of allowing classmates and teachers to intervene during the writing process:

> [B]oth peers and teachers can intervene and guide the writing process. Students get response at various stages in the process, rather than response to the product alone. They learn more effective ways of planning, drafting, and revising and can pay selective attention to various aspects of the writing process. This method means multiple drafts and fewer finished products, but it results in students learning how to improve their writing.

Phelps, *Legal Rhetoric*, *supra* note 7, at 1100.

The benefits of intervening during the writing process have not escaped the attention of law faculty teaching advanced legal writing courses and even "substantive" seminars. *See, e.g.*, M. RAY & B. COX, *supra* note 107, at 358; Kissam, *Seminar Papers*, *supra* note 8, at 344-46.

109. See "Lessons from Learning Theory," *supra* Part II, for a discussion of the need for learners to talk to others to construct knowledge.

students individually generate outlines of the discussion sections of their memoranda and then, in their law firms, discuss the outlines with the same five or six classmates; and (3) the students read rough drafts of their memos aloud[110] to at least one of those same classmates for reader response, which provides direction for later major revising.[111] We use the same pattern for the "open" or "research" memo, except that the students describe to one another the research strategies that they crafted to locate relevant authority rather than analyze individual cases they receive with the packet of memorandum materials.

Concentrating on the writing process rather than the written product empowers students by showing them that writing is "a process that we can analyze, understand, and *control*."[112] Writing is not a matter of memorizing rules or anticipating and placating the whims of individual teachers, but rather a process involving at least two "rhetorical" concerns:[113] (1) Audience: For whom am I writing this product?; and (2) purpose: Why am I drafting this document? (*i.e.*, What problem am I trying to solve?) What do I want my reader to know or to do after reading it?[114] Even this much insight into the writing process equips students to approach their assignments with greater self-assurance. And assessment is not a matter of whether the teacher "likes" the product, but rather how well the product "fulfills the writer's intention and meets the audience's needs."[115]

In addition to advocating that writing is a process, the new rhetoric insists that writing is a process of *discovery* and *creation* (not merely communication).[116] Although I believe that many legal writing teachers succumb to the traditional paradigm's concern for

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110. We require students to read their work-in-progress aloud for several reasons, one of which is that "[i]t is equally important . . . for the writer to hear his or her own voice. Our voices often tell us a great deal about the subject." Murray, *Writing as Process: How Writing Finds Its Own Meaning*, in EIGHT APPROACHES TO TEACHING COMPOSITION 15 (T. Donovan & B. McClelland ed. 1980). For a more detailed explanation and justification of the "read-aloud" method, see *infra* notes 151-53 and accompanying text.

111. I distinguish between revising and editing. *See* D. PRATT, *supra* note 107, at 149-53. Richard Neumann, in his new book, includes a series of checklists that enable students to revise and edit their rough drafts by responding to explicit and sophisticated questions. *See* R. NEUMANN, *supra* note 107, at 65-74, 82-84, 105-06, 120-22.

112. Phelps, *Strategies*, *supra* note 9, at 156 (emphasis added).

113. *See* Frey, *supra* note 102, at 97.

114. V. HOWARD & J. BARTON, THINKING ON PAPER 30 (1986).

115. Phelps, *Legal Rhetoric*, *supra* note 7, at 1094.

116. Recent investigations into the writing process posit that writing is even more than a means of discovery. "[W]riting [is] a means of discovery, of getting in touch with the self, of coming to know rather than to report." L. EDE & A. LUNSFORD, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING 44 (1990).

product rather than process, I also believe that most teachers of legal writing, from their professional beginning, strongly reject the instrumental view of writing.[117] We recognize that "most writers have only a partial notion of what they want to say when they begin to write," and that they develop their ideas "in the process of writing."[118] It is this conviction that affirms our belief that we are partners with the rest of the law faculty in helping students refine their analytical skills and learn substantive law.

Legal writing programs need to be self-conscious and explicit in conveying the character of legal writing as a process of legal reasoning and not as a mere skill. Students who are expected to engage in writing exercises designed to simulate the conventional writing in law practice and then who plead that they know far more than they managed to convey in writing are, I now believe, profoundly mistaken. They do not fail to convey what they already know, they fail to do the reasoning that writing requires of them. We fail to empower them to "find their professional and personal voices that will allow them to engage in the ongoing conversation of the law."[119]

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117. Kissam, *Thinking*, *supra* note 8, at 136.

118. Hairston, *supra* note 97, at 85. Kissam expands on Hairston's point and applies it to legal writing:

> This focus on instrumental writing misses the fundamental point that the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought. . . . In such cases, the actual writing of the analysis, be it an appellate brief, law review article, memorandum, or estate plan, will allow *the writer as thinker* to develop new connections or new ideas about what the law is or how it should be applied in particular situations.

Kissam, *Thinking*, *supra* note 8, at 140 (emphasis in original).

One professional writer and professor of writing goes even further in his provocative description of the writing process. To him, writing does not simply help the writer develop or discover his or her ideas, but just the reverse: the writer helps the writing say what "it intends to say."

> The writer drafts a piece of writing to find out what it may have to say. The "it" is important. The writing process is a process of writing finding its own meaning. While the piece of writing is being drafted, that writing physically removes itself from the writer. Thus, it can be examined as something which may eventually stand on its own before a reader. This distancing is significant, for each draft must be an exercise in independence as well as discovery.
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> The final state in the writing process is *revising*. The writing stands apart from the writer, and the writer interacts with it, first to find out what the writing has to say, and then to help the writing say it clearly and gracefully. The writer moves from a broad survey of the text to line-by-line editing, all the time developing, cutting, and reordering. During this part of the process the writer must try not to force the writing to what the writer hoped the text would say, but instead try to help the writing say what it intends to say.

Murray, *supra* note 110, at 5 (emphasis in original).

119. Phelps, *Legal Rhetoric*, *supra* note 7, at 1102.

B. *Writing as Social Activity*

> [W]riting groups . . . contribute to our understanding of what it means to write. Specifically, writing groups highlight the social dimension of writing. They provide tangible evidence that writing involves human interaction as well as solitary inscription. Highlighting the social dimension enlarges our view of writing because composition studies has, until recently, conceptualized writing as a solo performance.[120]

Several times during Legal Writing I, we transform law firms into writing groups, one of the oldest forms of collaborative learning. As social groups of writers who respond to one another's writing,[121] writing groups document that writing is conversation, not monologue, and that a "text"—whether correspondence, contract, will, memorandum, or brief—is not an "autonomous object," but rather "an event produced by the interaction of reader and writer . . . ."[122] Writing groups yield two important insights for law students: (1) Writing is not inherently an individual and private activity,[123] and (2) legal writing is not a self-centered or self-indulgent endeavor.[124]

As writing groups, the law firms provide valuable service for law students. Most notably, writing groups remind legal writers that they write for others; writing groups promote audience awareness in a variety of ways. "One of the benefits continually attributed to the collaboration of writing groups is that they bring writers and readers closer together, thereby providing writers a direct experience with audiences."[125] This direct experience with audiences means that a writer can observe audience reaction to the

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120. A. GERE, *supra* note 60, at 3.

121. *Id.* at 1. Gere points out that response can take various forms: "Some groups exchange written drafts and receive verbal or written comments, while some read aloud and receive oral response. . . . Some intervene directly in members' writing—helping generate ideas or telling the writer what to do next—while others restrict responses to what has already been written." *Id.*

122. Trimbur, *supra* note 63, at 95.

123. In a most interesting book, Karen LeFevre argues that:

> [R]hetorical invention is better understood as a social act, in which an individual who is at the same time a social being interacts in a distinctive way with society and culture to create something. Viewed in this way, rhetorical invention becomes an act that may involve speaking and writing, and that at times involves more than one person; it is furthermore an act initiated by writers and completed by readers, extending over time through a series of transactions and texts.

K. LEFEVRE, INVENTION AS A SOCIAL ACT 1-2 (1987).

124. "[A]ll discourse must *communicate* to the audience in order to be successful." Phelps, *Legal Rhetoric*, *supra* note 7, at 1100 (emphasis added).

125. A. GERE, *supra* note 60, at 66.

text,[126] and can even ask readers for their general and specific responses to it. True audience awareness enables the writer to shed the writer's own perspective and don the reader's perspective, thus improving writing and revising practices.[127] The "social interaction [of writing groups] can lead to a heightened awareness of others' points of view and thereby promote a 'decentering' of the writer's frame of reference essential to audience awareness."[128]

Awareness of audience is particularly important to legal writers. Legal writing is writing designed for others; it is fundamentally purposive, not personally expressive. "[S]omeone else will use their writing to do something else . . . ."[129] Writing groups afford writers opportunities to test whether their writing communicates effectively enough that the reader can use that document to "do something else."

Writing groups also reduce the "alienation" from audience and language that unseasoned writers often experience during the writing process. Particularly for inexperienced writers, writing feels intensely private, often lonely or isolating. The anguish of facing a blank page, the trepidation that accompanies performing a task for the first time, and the uncertainty associated with learning a new language combine to produce a sense of powerlessness, frustration, even senselessness in attempting to complete the task. Writing groups, with their inevitable companionship, cooperation, and collaboration, help to overcome the sense of alienation that often consorts with the writing process.

In addition to promoting audience awareness, writing groups prepare law students to enter the practice of law in which professionals often share the writing process: "Our research . . . indicates that writing teachers err if, in envisioning students' professional lives upon graduation, they imagine them seated alone, writing in isolation, misplaced Romantic spirits still struggling in a professional garrett [sic] to express themselves."[130] Lawyers and law teachers have only barely begun to study the writing practices and strategies of lawyers. Anecdotal evidence promises that when we do such study, we will find that a significant percentage of legal writing is cooperative or collaborative writing.

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126. "In physical terms, writing groups reduce the distance between writer and reader. Even when responses take written form, authors operate in close proximity to an audience, enjoying opportunities to observe the effects of their work or to ask questions." *Id.* at 3.

127. Peer response or attention to "reader's need[s]" can "promote habits of revision with readers in mind." Trimbur, *supra* note 63, at 97.

128. *Id.*

129. Phelps, *Legal Rhetoric*, *supra* note 7, at 1100.

130. L. EDE & A. LUNSFORD, *supra* note 116, at 72.

Finally, writing groups furnish concrete and rapid response to student work impossible in most legal writing programs that continue to suffer from an appallingly high student/faculty ratio.

> In temporal terms, all writing groups provide response with an immediacy impossible in teachers' marginalia or reviewers' evaluations. Whether they receive comments from three individuals or a classroom full of people, writing group participants do not have to wait days or months to learn what others think of their work.[131]

In summary, the social nature of writing groups promotes audience awareness, reduces alienation from language, introduces collaboration, and provides ready response to work-in-progress.

C. Preparing Writing Group Participants

As all the literature warns, however, merely turning students loose in writing groups to "fix" one another's writing is more mischievous than effective.[132] In writing groups that operate within a formal educational environment, the professor must prepare students, intellectually and socially,[133] to participate in writing groups. The intellectual preparation involves telling students why the writing course incorporates writing groups and what the students might accomplish over time through those groups.[134] Intellectual preparation also involves reviewing with students the stages in the composing process[135] (model one: inventing, drafting, revising, editing, and proofreading; or model two: rehearsing, drafting, and revising) and explaining the role of a writing group at each of those stages.[136] Most perplexing is the puzzle of bringing students to accept that they are capable of teaching and learning from one another.

> Participants in collaborative groups learn when they challenge one another with questions, when they use the evidence and information available to them, when they develop relationships among issues, when they evaluate their own thinking. In other words, they learn when they assume that knowledge is something

131. A. GERE, *supra* note 60, at 3.

132. *See generally* A. GERE, *supra* note 60; FOCUS ON COLLABORATIVE LEARNING, *supra* note 70; LEARNING IN GROUPS, *supra* note 43.

133. See *supra* text accompanying notes 89-91 for the opinion that all collaborative learning demands social as well as intellectual skills.

134. Copeland & Lomax, *Building Effective Student Writing Groups*, in FOCUS ON COLLABORATIVE LEARNING, *supra* note 70, at 99-100.

135. For a fascinating account of the writing process and the forces that interact during the writing process, see Murray, *supra* note 110, at 4-12.

136. *Id.*

> they can help create rather than something to be received whole from someone else.[137]

Productive writing groups require that students learn to express honest, thoughtful, and challenging responses to the writing they read. "Nice" comments confuse or deceive the writer and cheat the writer out of responses that would allow the writer to "fulfill the writer's intention and meet the audience's needs."[138] Productive writing groups are the practice that bears witness to the observation that learners create knowledge socially, in conjunction with others.[139]

Social skills, or the ability to cooperate and collaborate with peers, are equally essential to productive writing groups. To cooperate in the fashioning of a text, all members of writing groups must be able to listen carefully and read closely. All participants must be able to give and receive criticism.

In writing groups, writers require different social skills than their collaborators and readers. Writers must be able to maintain individual identities (that is, retain their distinctive voices), approach the writing group with self confidence, and accept responsibility for their written products.[140] Writers need to nurture the inclination to use "the advice/suggestions of the group wisely . . . ."[141] The inclination to use collaborators' and readers' comments and suggestions wisely requires that writers: (1) quietly listen to responses and reactions, (2) refrain from quarreling with the responses and reactions offered, and (3) consider seriously, not automatically reject, what collaborators or readers report.[142]

Not only must teachers who adopt writing groups prepare writers to "use the advice/suggestions of the group wisely,"[143] but teachers must also prepare readers and collaborators to respond to another's work-in-process. Readers must learn to articulate their reactions and responses to a text. They must be able to ask for clarification or detail, state opinions, and suggest ways to meet the writer's goals or the reader's needs. Reader response can take various forms, and there are two major categories of response: Criterion-based response and reader-based response. "Criterion-based"

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137. A. GERE, *supra* note 60, at 69.

138. *See* Phelps, *Legal Rhetoric*, *supra* note 7, at 1094.

139. *See supra* text accompanying notes 58-61.

140. Simpson-Esper, *Monitoring Individual Progress in Revision Groups*, in FOCUS ON COLLABORATIVE LEARNING, *supra* note 70, at 94.

141. *Id.* at 93-94.

142. Copeland & Lomax, *supra* note 134, at 103 (referring to P. ELBOW, WRITING WITHOUT TEACHERS (1973)).

143. Simpson-Esper, *supra* note 140, at 94.

comment "translates the reader's experience of the text into a judgment by measuring it according to recognized standards such as unity, coherence, style, correctness, and so on. . . . Criterion-based feedback strives for critical awareness and the development of discriminatory judgment."[144]

In contrast, "reader-based" comment "presents the reader's experience of a piece of writing, the 'raw data' of perceptions and reactions. . . . Reader-based feedback strives for richness in describing the effects a writer's words produce in the reader."[145] Refining the category of reader-based comment are two sub-categories: Facilitative feedback and directive feedback. "Facilitative [reader-based feedback] focuses on the relation between the writer's intentions and the effect of a text on a reader. Such feedback will tend to take the form of questions 'aimed at making the writer more reflective about the sufficiency of choices' in a piece of writing."[146] "Directive [reader-based] feedback [tends] to impose the reader's own agenda by specifying changes that need to be made in a text."[147]

Initially, when we incorporated writing groups into Legal Writing I, we instructed students to offer criterion-based feedback. I now believe that this was a mistake for two reasons: (1) The majority of our students are not sufficiently expert at writing "rules," or "recognized standards" of writing to feel confident about offering criterion-based feedback; and (2) writers felt that readers missed the forest for the trees, "correcting" grammar mistakes but not paying attention to the global concerns of analysis and organization. I perceived that readers imitated real or imagined "English

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144. Trimbur, *supra* note 63, at 102 (citing P. ELBOW, WRITING WITH POWER (1981)).

145. *Id.*

146. *Id.* The following checklist includes several facilitative reader-based response questions:

1. What things do you like best about the piece, and why are they good?
2. Is there anything that doesn't seem appropriately addressed to the intended audience? What, and why not?
3. Is there anything that makes you say "So what?" or "Specify!"? If so, put these words in the margins where you think they will be helpful.
4. In the margin, write "Say more," "Expand," "More details," or something like this at points where you as a reader need additional information in order to participate more fully in the event or the idea presented.
5. . . . .
6. How close to being ready to be turned in to a stranger [or teacher] for evaluation is this piece?

Circle one number: not ready 1 2 3 4 5 6 7 8 9 10 ready.

Thompson, *Ensuring the Success of Peer Revision Groups*, in FOCUS ON COLLABORATIVE LEARNING, *supra* note 70, at 114.

147. Trimbur, *supra* note 63, at 102.

teachers," doing what writers expected teachers to do but not doing it as well. Currently, we ask students to respond to each other's work by using facilitative reader-based feedback.

Once writing group participants are equipped to share responses to one another's work, the writing groups need to meet more than once during the composing stage. Writing groups affect the quality of the writing process and the text least if they meet only after the author has finished or nearly finished the text. Thus, writing groups should hold "work-in-progress" sessions.[148] Writing group participants should comment initially on analysis of issues and development of ideas. We now find it most fruitful to prohibit members of writing groups from discussing stylistic concerns or "grammar, spelling, or word choice"[149] early in the writing process. Rather, we ask group members "to think globally about the rough draft, to ask themselves big questions: . . . . Does [the writer's analysis] need more information or detail? Does the writer's purpose seem clear and consistent? Does the analysis unfold logically, or does it meander?"[150] Is the memo neutral?

Advice differs about the methodology for obtaining reader response during work-in-progress sessions. Should work-in-progress be read aloud and, if so, by whom? That is, should writers read papers aloud to group members, or should a group member read the writer's paper aloud to the author and the rest of the group? Of course, the contrary view is that readers should *read* work-in-progress silently to themselves. Expert advice conflicts with my students' opinions. Experts assert that:

> Reading aloud permits the editors to digest the text more slowly and, more importantly, to attend to the sounds and rhythms of the prose. They discover how much the ear picks up what the eye misses.[151]

> [A]s their papers are read aloud, group members are forced to pay attention to the larger rhetorical issues in the paper. Since they don't have the actual text in front of them, the members can't be distracted by surface or proofreading issues. Also, while listening, group members have the freedom to write questions they have about the paper without interrupting the reading. These questions can be discussed later with the whole group and may lead to

148. Foley, *Revising Response Groups*, in FOCUS ON COLLABORATIVE LEARNING, *supra* note 70, at 118.

149. *Id.*

150. *Id.*

151. *Id.* at 120.

specific suggestions for revision.[152]

> It is equally important, perhaps more important, for the writer to hear his or her own voice. Our voices often tell us a great deal about the subject. The piece of writing speaks with its own voice of its own concerns, direction, meaning. The student writer hears that voice from the piece convey intensity, drive, energy, and more—anger, pleasure, happiness, sadness, caring, frustration, understanding, explaining. The meaning of a piece of writing comes from what it says *and* how it says it.[153]

Despite its theoretical virtues, the read-aloud method receives complaints from our students. They report that they cannot identify problems because they need the ability to read, to stop and reread, to reflect on the paragraph, page or section, and to flip back and forth from one point to another. Our experiences do confirm, however, that reading, rather than listening to, a memo distracts students from the global concerns regarding analysis and organization, to editing and even proofreading too early in the composing process. My current hypothesis is that we do not prepare students psychologically to offer genuine reaction to text or to find words for their reactions.

Sometime after the work-in-progress session, writing groups can hold editing sessions.[154] During editing sessions, readers work as real editors or lawyers do in preparing a piece of writing for submission to a senior partner or filing with a court. The editing sessions need to occur sometime after the work-in-progress sessions to allow writers several days to revise their rough drafts. Often I use an intervening class meeting for large group writing discussion and instruction. In the editing session, students can focus on paragraph and sentence structure, transitions, and word choice. "Again, I discourage mere correcting, on the premise that spelling and grammar are the writer's responsibility . . . ."[155]

Over time, writing groups that meet often during the composing process—in work-in-progress sessions and in editing workshops—expand students' inventory of writing (and response) knowledge, abilities, and strategies. Thus, students come to tolerate and, sometimes, even appreciate the writing process.

> Revision, which students tend to view as punitive, takes on a new role. First of all, it is not the last thing students do before

152. Thompson, *supra* note 146, at 111.

153. Murray, *supra* note 110, at 15 (emphasis in original).

154. The ideas in this paragraph come from Foley, *supra* note 148, at 119-21.

155. *Id.* at 120.

> turning in a paper. The students revise throughout the writing process, rather than make minor changes at the end. Revising, as its root suggests, can be a way of re-seeing the problem and thus can result in substantive changes. Like skilled writers, students will become less satisfied with first drafts and effectively revise at the level of content and form.[156]

Students who come to comprehend the complexity and claims of the writing process are much better prepared as novice lawyers. They can better allocate their time, plan their projects, and turn out text to suit their audiences than if the writing process controlled or mystified them.

D. Preparing the Professor Who Adopts Writing Groups

Writing groups challenge the roles and responsibilities of professors as fundamentally as they challenge the roles and responsibilities of writers and readers. Rather than remaining the "expert" and lecturing about writing, and serving as the exclusive audience of the students' writing,[157] and grading it, professors exchange those roles to act as architect, coach,[158] midwife,[159] and representative of the professional community. Professors must prepare writers and readers to participate in writing groups, create writing assignments and writing group tasks with clear and explicit instructions, and monitor the meetings of the writing groups.

Professors must remain involved in the writing groups even after they begin to meet. While writing groups are in session, the professor can wander through the room(s), observing what is happening and listening to what the students are saying.[160] Early in the process, professors can intervene and offer suggestions for improving the response or group process.[161] Professors should hold follow-up or de-briefing sessions[162] the same day the writing groups meet or at the next class meeting, soliciting reports from groups and examples of strengths, weaknesses, or problems. Professors can take up any particular issues that arose during the writing groups' meetings, ask the group members to explain to the larger class the best or most effective comment or lesson of the group meeting, and

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156. Phelps, *Legal Rhetoric*, *supra* note 7, at 1100-01.

157. *See* Hairston, *Composition Slave*, *supra* note 101, *passim*.

158. The idea of professor as coach comes from Alfred Mathewson, Professor, University of New Mexico School of Law.

159. WOMEN'S WAYS OF KNOWING, *supra* note 60, at 217-19.

160. Thompson, *supra* note 146, at 115.

161. *Id.* at 115-16.

162. Booher, *A Writing Teacher's Guide to Processing Small-Group Work*, in FOCUS ON COLLABORATIVE LEARNING, *supra* note 70, at 43-46.

explore any remaining ambiguities in the process or assignment.

Even with writing groups and the innumerable benefits they bring, faculty, as representatives of the relevant professional community, remain responsible for the "final" assessment of texts and the judgment of competency.[163]

IV. From Intervention to Collaboration

> The last twenty years are generally regarded as having witnessed a large shift in writing pedagogy, sometimes as a growing awareness of process and context, sometimes . . . as a move from teacher-centered to student-centered learning models. We wish to acknowledge the effects of these largely positive shifts, most of which in our view run counter to the traditional valorization of autonomous individualism, competition, and hierarchy. But in spite of these pedagogical efforts, most day-to-day writing instruction in American colleges and universities still reflects traditional assumptions about the nature of the self (autonomous), the concept of authorship (as ownership of singly held property rights), and the classroom environment (hierarchical, teacher-centered).[164]

One of my biggest worries as I considered adopting writing groups was how would I recognize, honor, and assess the writer's contribution to the final version of the text. I perceived the role of teacher to be the person who needed to make expert judgments on the reasoning and writing skills of the writer. If the writer submitted a paper, improved by the responses, suggestions, or corrections

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163. Commenting on and grading papers is an art in itself. It is not an art without controversy. I do believe, however, that the "new rhetoric" and the rest of what composition theory has to tell us greatly improves the process of "marking papers." Olivia Frey comments:

> How teachers mark compositions has changed dramatically since I was a teaching assistant. Rather than marking up a paper with cryptic correction symbols, the teacher more often asks questions, makes suggestions, or records immediate responses. According to Nina Ziv, comments on essays "can only be helpful if teachers respond to student writing as part of an ongoing dialogue between themselves and their students. In order to create such a dialogue, teachers might begin by responding to student writing not as evaluators and judges but as interested adults would react to such writing."

Frey, *supra* note 102, at 103 n.4 (quoting Ziv, *The Effect of Teacher Comments on the Writing of Four College Freshmen*, in New Directions in Composition Research (R. Beach & L. Bridwell ed. 1984)).

See also Gebhardt, *Unifying Diversity in the Training of Writing Teachers*, in Training the New Teacher, *supra* note 101; Hairston, *Composition Slave*, *supra* note 101; Larson, *Making Assignments, Judging Writing, and Annotating Papers: Some Suggestions*, in Training the New Teacher, *supra* note 101.

164. L. Ede & A. Lunsford, *supra* note 116, at 112.

of classmates as readers or critics, how was I to identify the writer's strengths and diagnose the writer's weaknesses? How was I to assure competency? I attempted to protect the "integrity" of each student's work product by carefully limiting the time, place, and purpose of interventions as well as the identity of legitimate intervenors (readers).

Some readers of this article will no doubt share my concerns while others will certainly chuckle at my naiveté. Readers of this article who have adopted writing groups, however, have personal experience supporting the conclusion that:

> [O]ne does not become a writer until she learns to trust her own instincts, to know that ultimately she, and she alone, is responsible for what is on the page. Group work helps the student writer move toward this responsibility, for it provides a reader whose role is to nudge, like an alter ego, rather than to negate, like a dictator.[165]

The more I learn about composition theory and composition pedagogy, the more I become aware that writing is inevitably a complex and social process. Who is the "individual" author of any text? Is any text truly an individual and solitary effort? Even when a writer creates a text by him or herself—I mean by that the writer does not discuss the text with anyone before and during the composing stage and involves no readers or critics before completion—the shape of the text may owe something to a variety of forerunners, whether family members, earlier writers read by the "individual writer," teachers, or friends. My initial concern perpetuated the concept of the solitary writer producing text while secreted away in a library or study. That concept is not only inaccurate or at least terribly constrained, but it projects a suspicious and stingy climate in which to cultivate writing and reasoning skills. It gnaws at, rather than nourishes, a sense of community among writers.

I have moved from someone who warily experiments with writing groups and writing intervention to an advocate of collaborative writing. Not only do "law firms" serve as writing groups in which individual writers obtain reader response during the composing process on their individual texts, but we ask students to produce collaborative writing, *one* product that represents the work of some or all members of the writing group.

Collaborative or group writing is not yet the subject of a large

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165. Lunsford, *Planning for Spontaneity in the Writing Classroom and a Passel of Other Paradoxes*, in TRAINING THE NEW TEACHER, *supra* note 101, at 107.

body of research. The one current "scholarly" text that examines the theories and practices of collaborative writing,[166] and two collaboratively written novels[167] tell us something about collaborative writing in several distinct contexts—professional and educational contexts, an expressive context, and a political context. The loudest message is that, "WHAT is in the book cannot be disassociated from HOW it came to be."[168] Other themes include: What is/are the process(es) of collaborative writing? Who is or are the authors? Does collaboration involve a "loss of self or subjectivity [or] instead a deeply enriching and multiplicitous sense of self"?[169]

What does any of the work on or examples of collaborative writing have to tell us about "legal writing" you might well ask. Would the study of collaborative writing improve legal writing programs in law schools or the writing practices and strategies of lawyers? I hope that many of us will begin to explore and probe these questions; the answers may well have as much to offer lawyers and their audiences as findings so far have offered other professional writers and their readers.

CONCLUSION

Reflecting on our experiences using writing groups has enticed us to stray from standard manuals of *How to Teach Legal Writing* into the fertile fields of composition theory and pedagogy. Once captured by its provocative findings and suggestions, we find ourselves enchanted by its most fundamental theoretical questions:

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166. L. EDE & A. LUNSFORD, *supra* note 116 (study of collaborative writing in seven professions, not including the practice of law).

167. M. BARRENO, M. HORTA & M. DA COSTA, THE THREE MARIAS: NEW PORTUGUESE LETTERS (H. Lane trans. 1975) [hereinafter THREE MARIAS]; M. DORRIS & L. ERDRICH, THE CROWN OF COLUMBUS (1991).

168. *Authors' Afterword*, in THREE MARIAS, *supra* note 167, at 399. The rest of the quote goes as follows:

> A description of the content of *The Three Marias: New Portuguese Letters* is scarcely possible without reference to the interpersonal dynamics, the day-to-day experience of the three authors while involved in its creation. WHAT is in the book cannot be disassociated from HOW it came to be. This is not the work of an isolated writer struggling with personal phantoms and problems of expression in order to communicate with an abstract Other, nor is it the summing-up of the production of three such writers working separately on the same theme. The book is the *written record* of a much broader, common, lived experience of creating a sisterhood through conflict, shared fun and sorrow, complicity and competition—an interplay not only of modes of writing but of modes of being, some of them conscious and some far less so, all of them shifting in the process, and all three of us still facing, even today, the question of *how*.

Id. (emphasis in original).

169. L. EDE & A. LUNSFORD, *supra* note 116, at 142.

How do writers invent?[170] How do writers write? What does it mean, in any particular time and place, to be "a writer"?[171] What is the function and scope of rhetorical invention? What are the relationships between writer and text? between writer and audience? between text and reader?

We also confront difficult pedagogical questions: "[T]hose interested in collaborative learning [should] step back and ask what such learning will be used for, what aims and purposes and motives are served, who will and will not 'count' as a collaborator (and why), where power and authority are located."[172] In writing groups, do all members have an "equal" voice? Are writing groups democratic? How can writing teachers assure that writing groups are genuinely inclusive, collaborative, affirming, and respectful?

Perhaps because we or our institutions assume that our students know "how to write" before they come to law school (or, if not, there is no hope anyway), or because legal writing teachers are not experts on composition theory, most legal writing programs do not concern themselves with these questions . . . yet. Lawyers are, however, professional writers (maybe even collaborative writers at times), and it is our job to help our students negotiate the process of "learning to find their professional and personal voices."[173] Presumably, the more we know about the writing process and writers, the more effective guides we can be. Certainly, the more we know about the writing process and writers, the more engaging and rewarding our professional lives and relationships with students will be.[174]

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170. *See, e.g.*, K. LEFEVRE, *supra* note 123.

171. *See, e.g.*, L. EDE & A. LUNSFORD, *supra* note 116.

172. *Id.* at 115.

173. Phelps, *Legal Rhetoric*, *supra* note 7, at 1102.

174. My colleagues at the University of Montana participate actively in our Legal Writing Program. Dean J. Martin Burke remodeled the Legal Writing Program in 1978 and 1979, and has maintained a strong interest in the program ever since. Professor Brenda Desmond directed the writing program during 1986-87, teaching Legal Writing I and Legal Writing IV, and continues to teach in the program. Professor Scott Burnham has participated extensively in the first-year component of the writing program and continues to offer advice and support. Other law colleagues, including Professors Steve Bahls, Bill Corbett, W.F. Crowley, Ed Eck, Larry Elison, Bud Michel, Greg Munro, Rob Natelson, Dave Patterson, and Carl Tobias have served as faculty advisors in the Appellate Advocacy course over the last decade.

The Legal Writing Program at the University of Montana owes an immeasurable debt to Carolyn Wheeler who served as a research assistant for two summers, a teaching assistant for three semesters, an external assessor of trial briefs for three years following her graduation, and a true collaborator on pre-tests, writing checklists, Introductory Program materials, and memoranda assignments since 1984.

APPENDIX

Legal Writing I

Legal Writing I, a three credit course, contains the content common to most basic legal writing courses nationally—the fundamentals of legal research, memorandum drafting, and citation form. In our course, students draft four short papers and two internal office memoranda of law that use the substance of first-year courses as the bases of the issues raised.

What distinguishes this course from many nationally is the self-conscious concern with the writing process and the methodology used—writing groups. Students meet in small groups twice a week for about two hours per meeting. In those meetings, students cooperate in developing legal research skills (manual and computerized), legal writing skills, and legal reasoning skills.

Legal Writing II

Legal Writing II, a one credit course, is devoted to the jurisprudence paper the students write, synthesizing their semester-long study of analytical and normative jurisprudence.[175] The jurisprudence paper is one of the few assignments that responds directly to the perspective dimension of lawyering.

Lawyering demands the ability to see beyond the narrow confines of any immediate problem to be solved. Naming this ability "perspective,"[176] the law school believes that its graduates should recognize the influence of historical and cultural forces, economic and governmental institutions, social ideals, and jurisprudential principles on the character of the law. Also, graduates should appreciate the social roles and responsibilities of lawyers.

Currently, the Legal Writing Program explicitly incorporates material included under the broad heading of "jurisprudence." Throughout the first semester, a faculty member with a joint appointment in the philosophy department and the law school, whose specialty is jurisprudence, attends the Legal Reasoning short course in the Introductory Program and prearranged classes of the first-semester contracts course. He discusses with the students the nature and sources of law, the problems raised by judicial interpretation of law, and issues of policy and value often ignored or ne-

175. For a more complete description of the jurisprudence component of the Legal Writing Program, see Huff, *A Heresy in the Ordinary Religion: Jurisprudence in the First Year Curriculum*, 36 J. LEGAL EDUC. 108 (1986).

176. *See* Mudd, *The Place of Perspective in Law and Legal Education*, *supra* note 3. *See also supra* note 3 and accompanying text.

glected in conventional first-year courses. The school attempts to cultivate entering students' natural curiosity about these subjects by introducing the principal jurisprudential traditions of Western law and recent issues raised by critical legal studies, critical race theory, and feminist legal theory. Students demonstrate their understanding of the jurisprudence material by completing a graded paper, analyzing the jurisprudence found in a particular assigned judicial opinion.

Legal Writing III

Legal Writing III is substantively and administratively connected to the required, second-year Business Organizations course. Typically, students, in two-person teams, draft a sophisticated partnership agreement. Students receive a "case file" early in the semester. The case file contains information about the goals and objectives of the mock clients, and financial statements about the mock clients themselves, including information about their personalities.

Throughout the semester, the professor supplements discussion of substantive issues of law with discussions about the effect of those issues on the mock clients. The class also discusses ethical concerns. Halfway through the semester, the class, as a group, interviews the client (a law professor). At the end of the semester, each team of students meets with one of the mock clients (this time portrayed by a third-year student) and explains the agreement to the client, focusing on how the agreement meets the needs of the client.

The assessment for the course not only includes traditionally assessed drafting skills, but also encompasses whether the students: (1) understand the role of the *lawyer* and the ethical issues facing the lawyer; (2) understand the role of the *law* in addressing the goals and concerns of the client; (3) understand how well the agreement addressed the goals and concerns of the client; and (4) properly analyzed the problems facing the client and made sound recommendations.

Legal Writing IV

This course emphasizes the major aspects of appellate advocacy. Students, in two-person teams, draft memoranda of law analyzing the legal issues to be briefed, draft a sophisticated appellate brief, and argue their case before a tribunal consisting of a member of the faculty, a member of the competitive moot court team, and presided over by a member of the State Bar of Montana. Moved to

the first semester of the third-year, the appellate advocacy course is the subject of possible curricular reform.